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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-86

DONALD E. POWERS,
PLAINTIFF, PETITIONER,

v.

BETHLEHEM STEEL CORPORATION,
DEFENDANT, RESPONDENT,

v.

McKIE LIGHTER CO., INC.,
DEFENDANT, RESPONDENT,

and

DONALD E. POWERS,
PLAINTIFF, PETITIONER,

v.

McKIE LIGHTER CO., INC.,
DEFENDANT, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

		Page
I	Opinion Below	2
II	Jurisdiction	2
III	Questions Presented	3
IV	Statutes Involved	3
V	Statement of Facts	4
VI	History of Proceedings	7
VII	Consideration Governing Review on Certiorari	8
VIII	Argument	10
IX	Conclusion	20
X	Appendix	
	A.) Opinion of the United States District Court for the District of Massachusetts dated May 23, 1972	21
	B.) Judgment of the United States District Court for the District of Massachusetts dated May 23, 1972	30
	C.) Opinion of the United States Court of Appeals for the First Circuit dated April 9, 1973	31
	D.) Judgment of April 9, 1973 in *Powers* v. *Bethlehem Steel Corporation*	41
	E.) Judgment of April 9, 1973 in *Powers* v. *McKie Lighter Co., Inc.*	42
	F.) Docket Entry of Judgment dated April 9, 1973 in *Powers* v. *Bethlehem Steel Corporation*	43
	G.) Docket Entry of Judgment dated April 9, 1973 in *Powers* v. *McKie Lighter Co., Inc.*	45
	H.) Memorandum and Order of United States Court of Appeals for the First Circuit dated May 10, 1973	47

Page

TABLE OF CITATIONS

Cases

Atlantic Transport Co. v. *Imbrovek*, 234 U.S. 52 (1913) 15, 16
The Bart Tully, 251 F. 856 (6th Cir. 1918) 9, 15
Berton v. *Tietjen & Lang Dry Dock Co.*, 219 F. 763 (N.J. 1915) 8
Biggs v. *Norfolk Dredging Company*, 360 F.2d 360 (4th Cir. 1965) 9, 14, 17
Barniff v. *Jackson Avt. — Gretna Terry, Inc.*, 280 F.2d 523 (5th Cir. 1960) 12
Brinegar v. *Iron Ore Construction Company*, 302 F. Supp. 630 (E.D. Ark. 1969) 12
Charles Barnes Co. v. *One Dredge Boat*, 169 F. 895 (E.D. Ky. 1909) 8, 11
Colby v. *Todd Packing Co.*, 77 F. Supp. 956 (Alaska 1948) 11
Cook v. *Beldon Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973) 8, 13, 16
Executive Jet Aviation, Inc. v. *City of Cleveland*, 409 U.S. 253 (1972) 9, 15, 16
The General Cass, Fed. Cas. No. 5307, p. 170 (E.D. Mich. 1871) 12
Grant Smith-Porter Ship Co. v. *Rohde*, 257 U.S. 469 (1922) 15, 18
Grimes v. *Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) 10, 14, 17
Guilbeau v. *Falcon Seaboard Drilling Co.*, 215 F. Supp. 909 (La. 1963) 11
Hark v. *Antilles Air Boats, Inc.*, 41 U.S.L.W. 2506-07 (V.I. 1973) 9, 18
The Haxby, 94 F. 1016 (E.D. Pa. 1899) 13

Page

Hess v. *United States*, 361 U.S. 314 (1960) 18
The Hezekian Baldwin, 8 Ben. 556, Fed. Cas. No. 6449 15
John J. Lesnor Co. v. *U. S.*, 182 F. 573 (9th Cir. 1910), cert. denied, 220 U.S. 609 (1911) 13
Kenny v. *New York*, 108 F.2d 958 (2nd Cir. 1940) .. 8, 11
Knapp, Stout & Co. v. *McCaffrey*, 177 U.S. 638 (1900) 9, 10
McWilliams Dredging Co. v. *United States*, 105 F. Supp. 582 (E.D. La. 1952) 15
Miller v. *Thomas M. Zowe, Jr. & Associates, Inc.*, 328 F. Supp. 54 (Ark. 1971) 11
Moores v. *Louisville Underwriters*, 14 F. 226 (W.D. Tenn. 1882) 8
Muntz v. *A Raft of Timber*, 15 F. 555 (E.D. La. 1883) 8, 11
Nacirema Operating Co., Inc. v. *Johnson*, 396 U.S. 212 (1969), reh. denied 397 U.S. 929 (1970) 15
New Bedford Dry Dock Co. v. *Purdy*, 258 U.S. 96 (1922) 9, 11
Nogueira v. *New York, N.H. & H.R.R.*, 281 U.S. 128 (1930) 9, 11
Offshore Company v. *Robinson*, 266 F.2d 769 (5th Cir. 1959) 11, 12
Peck v. *U. S. Steel Corp.*, 315 F. Supp. 905 (Minn.), aff'd 446 F.2d 891 (8th Cir. 1970) 8, 11
The Pioneer, 30 F. 206 (E.D. N.Y. 1886) 12
Pleason v. *Gulfport Shipbuilding Corporation*, 221 F.2d 621 (5th Cir. 1955) 10
Raft of Cypress Logs, Fed. Cas. No. 11, 527 (W.D. Tenn. 1882) 8
The Robert W. Parsons, 191 U.S. 17 (1903) 16
Seabrook v. *Raft of Railroad Ties*, 40 F. 596 (S.C. 1889) 8, 11

Page

Sprately v. *Tidewater Construction Corporation*, 238 F. Supp. 650 (E.D. Va. 1965) 14, 17

Stafford v. *Perini Corporation*, 475 F.2d 507 (1st Cir. 1973) 9, 14, 17

Stanley v. *Guy Scroggins Construction Co.*, 297 F.2d 374 (5th Cir. 1961) 9, 14, 17

Tregoning Boat Co. v. *United States*, 15 Cust. Ct. 196, C.D. 971 (1945) 8, 11

United States v. *A Raft of Timber*, 13 F. 796 (S.C. 1882) 11

United States v. *Bruce Dry Dock Co.*, 65 F.2d 938 (5th Cir. 1933) 9, 15

United States v. *Moran Towing & Transportation Co.*, 374 F.2d 656 (4th Cir. 1967) 8, 11

United States v. *One Raft of Timber*, 15 F. 555 (E.D. La. 1883) 8

Victory Carriers, Inc. v. *Law*, 404 U.S. 202 (1971), reh. denied 92 S. Ct. 731 (1972) 15

Statutes

1 U.S.C. §3 (1970) 3, 10

19 U.S.C. §1401 (1970) 4, 10

28 U.S.C. §1333 (1970) 3, 7

46 U.S.C. §688 (1970) 4, 7

46 U.S.C. §801 (1970) 4, 10

Miscellaneous Authority

Corpus Juris Secundum, Vol. 94, §1. 13

Gilmore & Black, The Law of Admiralty 30 (1957) .. 10

Moore's Federal Practice, Vol. 7A, p. 2311 - 14 (1972) 10

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To THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Donald E. Powers, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the First Circuit to review the judgments of

that Court entered on April 9, 1973 in the above-entitled actions pursuant to an Opinion rendered by that Court on the aforesaid date. A Petition for Rehearing was denied by said Court on May 10, 1973. The said judgments have been docketed and copies of those entries are appended hereto as Parts F and G of the Appendix. The judgments of April 9, 1973 are in the official record of the United States Court of Appeals for the First Circuit and copies are appended hereto as Parts D and E of the Appendix. The Memorandum and Order of May 10, 1973 denying rehearing is also in the official record and a copy is appended hereto as Part H of the Appendix.

I

Opinion Below

The opinion of April 9, 1973 of the United States Court of Appeals for the First Circuit does not yet appear in the official reporter. It is contained in the official record of said Court and a copy of said opinion is appended hereto as Part C of the Appendix. The Memorandum and Order of May 10, 1973 by the United States Court of Appeals for the First Circuit also does not appear in the official reporter. It is contained in the official record of said Court and a copy is appended hereto as Part H of the Appendix.

II

Jurisdiction

The judgments of the United States Court of Appeals for the First Circuit now sought to be reviewed were entered on April 9, 1973. Entry was made pursuant to an order dated that same day. On a Petition for Rehearing filed April 23, 1973, rehearing was denied on May 10,

1973. Entry of that denial was also made May 10, 1973. Therefore, this petition falls within the time prescriptions of Title 28 of the United States Code, Section 2101.

Jurisdiction to review the aforesaid proceedings exists by virtue of Title 28 of the United States Code, Section 1254.

III

Questions Presented

1. Is a raft a vessel for the purposes of the General Maritime Law?

2. Did a cause of action for negligence occurring on a raft in navigable waters arise within the scope of admiralty and maritime jurisdiction?

IV

Statutes Involved

The case involves the following statutes:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States of:
> (1) Any civil cases of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled . . ."
>
> 28 U.S.C. §1333 (1970), Vol. 7, p. 7568.
>
> "The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."
>
> 1 U.S.C. §3 (1970), Vol. 1, p. 2.
>
> "The word 'vessel' includes every description of water craft or other contrivance used, or capable of

being used, as a means of transportation on water, but does not include aircraft."

19 U.S.C. §1401(a) (1970), Vol. 5, p. 4974.

"The term 'vessel' includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water."

46 U.S.C. §801 (1970), Vol. 10, p. 11469.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. §688 (1970), Vol. 10, p. 11451.

V

Statement of Facts

On or about October 6, 1967, the plaintiff, Donald E. Powers, was employed as a pile driver and dock builder

by the McKie Lighter Co., Inc. (hereafter McKie). In the course of his employment, the plaintiff was required to perform many duties on or about navigable waters. (R.A. 19-25, 28-32, 99, 284, 304, 305) These duties included the handling of dories, rafts and lighters. (R.A. 20-25) Often the plaintiff would serve as a deckhand aboard McKie vessels and assist in navigation. (R.A. 20-23, 28, 29, 31, 32, 43, 99, 260, 284, 285, 304, 305) While the plaintiff was navigating a raft owned by the defendant McKie on the aforesaid date, the plaintiff sustained grave personal injuries losing an eye and incurring substantial coronary damage. (R.A. 45-48, 258, 304, 305)

At the time of the injury, the plaintiff was standing aboard a raft approximately twenty-five feet long by five feet wide. It was positioned next to a pier owned, operated and controlled by Bethlehem Steel Corporation, (hereinafter Bethlehem). The raft was being used to transport men and equipment to work sites, activity which was typical of the manner in which the raft had been used by the plaintiff for nearly two months previously. (R.A. 25-32, 43, 45, 158, 260, 284, 285, 304) Indeed, the raft had been navigated on various occasions across great stretches of open water in order to perform similar tasks. (R.A. 28-32, 260, 284, 285)

The raft was being used by the defendant McKie in performance of its dockbuilding contract with the defendant Bethlehem. Under that contract, the defendant McKie was required to repair certain pilings supporting piers in a shipyard owned and operated by Bethlehem. (R.A. 357a). The work performed under that contract commenced in August of 1966. (R.A. 22). As a further part of that contract, it was the obligation and practice of the defendant Bethlehem to supply equipment to employees of the defendant McKie for dockbuilding and pile driving activities

on or near Bethlehem piers. (R.A. 27, 28, 33, 34, 39, 40, 50)

The accident occurred when a light supplied by Bethlehem exploded and bulb fragments entered the eye of the plaintiff. (R.A. 45-48, 288, 307).

The defendant Bethlehem had supplied to employees of the defendant McKie certain lighting facilities to illuminate working areas around and under the piers. On the day of the accident, an employee of the defendant Bethlehem gave to an employee of the defendant McKie a long cable with a plug at one end and a socket and bulb unit at the other without shields or reflectors. (R.A. 33, 34, 39-43, 258, 304-315) Bethlehem lighting equipment was often devoid of protective shields or reflectors in spite of the custom and practice in the dockbuilding industry to the contrary. (R.A. 33, 34, 39, 241, 242, 295, 315) It was also supplied in spite of prior complaints to officers of Bethlehem and of McKie that unprotected bulbs had been popping and that protected lighting was not always supplied. (R.A. 35, 37-39, 58, 59, 61, 121, 152, 153, 256, 261, 262, 289, 315)

The bulb exploded at approximately 5:30 a.m. It was suspended from a cord tied off on a pier. (R.A. 44, 45, 46) It hung down over the water and was positioned over the head of the plaintiff. (R.A. 42, 45)

The plaintiff was injured while in the process of moving the aforesaid raft and looking up at the bulb. (R.A. 42, 45) He did not have an opportunity to inspect the bulb prior to explosion and was not involved in securing the lighting equipment to the pier. (R.A. 39-45, 119, 158, 223) The plaintiff was unable to see or inspect the condition of the lighting equipment because of both darkness and bulb positioning. (R.A. 42-45, 119, 148, 172)

VI

History of Proceedings

Subsequent to the injury, the plaintiff commenced separate suits against McKie Lighter Co., Inc. and Bethlehem Steel Corporation. As against McKie Lighter Co., Inc., the plaintiff alleged causes of action under the Merchant Marine Act of 1920, 46 U.S.C. §688 (1970) (hereinafter the Jones Act) and the General Maritime Law for unseaworthiness, maintenance and cure. As against Bethlehem Steel Corporation, the plaintiff alleged negligence. Jurisdiction of the McKie action was founded on both 46 U.S.C. §688 (1970) and 28 U.S.C. §1333 (1970). Jurisdiction of the Bethlehem action was based on 28 U.S.C. §1332 (1970). Both actions were brought and consolidated for trial in the United States District Court for the District of Massachusetts.

The jury returned verdicts of $275,000 against both defendants, jointly and severally. However, the District Court entered judgments notwithstanding the verdicts in favor of both defendants on May 23, 1972. The Court ruled that the raft on which the plaintiff was injured was not a vessel. Furthermore, the evidence was such as to require the application of state law on the issue of Bethlehem's negligence. Any cause of action for negligence arose outside the scope of admiralty and maritime jurisdiction. The plaintiff was unable to sustain his burden of proof under state law.

The plaintiff appealed the entry of the aforesaid judgments to the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. §1291 (1970). On April 9, 1973, said Court of Appeals affirmed the rulings of the District Court.

A Petition for Rehearing was filed with the United

States Court of Appeals on April 23, 1973. Said petition was denied on May 10, 1973.

VII

Considerations Governing Review on Certiorari

The decision of the Court of Appeals for the First Circuit sought to be reviewed falls within the scope of Rule 19 of the Rules of the Supreme Court of the United States, and this petition should be allowed.

In particular, the decision conflicts with decisions of other Courts of Appeal on the same matter. Other appellate decisions have held a raft to be a vessel.

> Compare *Kenny* v. *New York*, 108 F.2d 958 (2nd Cir. 1940); *United States* v. *Moran Towing & Transportation Co.*, 374 F.2d 656 (4th Cir. 1967); *Peck* v. *U. S. Steel Corp.*, 315 F. Supp. 905 (Minn.), aff'd 446 F.2d 891 (8th Cir. 1970) where rafts were held to be vessels with *Cook* v. *Beldon Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973) where raft-like object was not a vessel. Note that district courts are in hopless confusion. Compare, e.g., *United States* v. *One Raft of Timber*, 13 F. 796 (S.C. 1882); *Muntz* v. *A Raft of Timber*, 15 F. 555 (E.D. La. 1883); *Seabrook* v. *Raft of Railroad Ties*, 40 F.596 (S.C. 1889); *Charles Barnes Co.* v. *One Dredge Boat*, 169 F. 895 (E.D. Ky. 1909); *Tregoning Boat Co.* v. *United States*, 15 Cust. Ct. 196, C.D. 971 (1945) where raft-like objects were classified as vessels with *Raft of Cypress Logs*, Fed. Cas. No. 11, 527 (W.D. Tenn. 1882); *Moores* v. *Louisville Underwriters*, 14 F. 226 (W.D. Tenn. 1882); *Berton* v. *Tietjen & Lang Dry Dock Co.*, 219 F. 763 (N.J. 1915) where raft-like objects were held not to be vessels.

No other appellate decisions have found a lack of admiralty and maritime jurisdiction under similar facts.

> See generally *Stafford* v. *Perini Corporation*, 475 F. 2d 507 (1st Cir. 1973); *Biggs* v. *Norfolk Dredging Company*, 360 F.2d 360 (4th Cir. 1965); *Stanley* v. *Guy Scroggins Construction Co.*, 297 F.2d 374 (5th Cir. 1961) where persons doing similar work had causes of action arise in admiralty. See also *United States* v. *Bruce Dry Dock Co.*, 65 F.2d 938 (5th Cir. 1933) and *The Bart Tully*, 251 F. 856 (6th Cir. 1918) where causes of action arose in admiralty without the involvement of "vessels".

This decision concerns an important question of federal law which has not been, but should be settled by this court. This decision defines the extent of admiralty and maritime jurisdiction when a person is injured aboard a non-vessel on navigable waters. The issue as stated was specifically reserved under the recent decision in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 253 (1972). Lower federal courts have reached conflicting conclusions on this issue since the *Executive Jet* decision.

> Compare *Powers* v. *Bethlehem Steel Corporation*, No. 72-1197 (1st Cir. April 9, 1973) with *Hark* v. *Antilles Air Boats, Inc.*, 41 U.S.L.W. 2506-07 (V.I. 1973).

This decision concerns two federal questions and conflicts with the applicable decisions of this court. First, this court has ruled that a raft similar to the one at bar may be a vessel for the purposes of applying the General Maritime Law.

> *Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638 (1900). See also *New Bedford Dry Dock Co.* v. *Purdy*, 258

U.S. 96 (1922); *Nogueira* v. *New York, N.H. & H.R.R.*, 281 U.S. 128 (1930).

The decision of April 9, 1973 did not hold the raft at bar to be such a vessel.

Second, this court has ruled that persons performing the same work as the plaintiff performed herein were involved in maritime service and engaging in maritime activity.

Grimes v. *Raymond Concrete Pile Co.*, 356 U.S. 252 (1958).

The decision of April 9, 1973 held that the plaintiff was not engaged in a maritime service or activity.

As a result, certiorari should be granted.

VIII

Argument

I. A Raft May Be a Vessel for the Purposes of the General Maritime Law.

Vessels are defined as:

". . . . floating structures capable of transporting something over water."

Gilmore & Black, The Law of Admiralty 30 (1957). See also 1 U.S.C. § 3 (1970); 19 U.S.C. §1401 (a) (1970); 46 U.S.C. § 801 (1970); *Pleason* v. *Gulfport Shipbuilding Corporation*, 221 F. 2d 621 (5th Cir. 1955); 7A Moore's Federal Practice 2311-14 (1972).

Several decisions have specifically considered the question of whether or not a raft is a "vessel". In *Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638 (1900), the Supreme Court held that a raft could be a vessel for the purpose of invoking admiralty jurisdiction to establish a lien for towage. Similarly, a raft could be a vessel for the purposes of making awards for salvage and enforcing the rules of navigation.

Muntz v. *A Raft of Timber*, 15 F. 555 (E.D. La. 1883); *United States* v. *A Raft of Timber*, 13 F. 796 (S.C. 1882).

Construction and shape do not appear to be determinative. In *United States* v. *Moran Towing & Transportation Co.*, 374 F.2d 656, 663 (4th Cir. 1967), it was strongly suggested that a wooden raft came within the definition of "vessel" provided in 1 U.S.C. § 3 (1964). Similarly, a raft composed of cross-ties lashed together was held to be a "vessel" in *Seabrook* v. *Raft of Railroad Cross-Ties*, 40 F. 596 (S.C. 1889). In *Tregoning Boat Co.* v. *United States*, 15 Cust. Ct. 196, C.D. 971 (1945) a "lifeboat" 17 feet long, 7 feet wide and only 30 inches deep shaped in a manner remarkably like a raft was also ruled to be a "vessel".

See generally, *New Bedford Dry Dock Co.* v. *Purdy*, 258 U.S. 96 (1922) (car float); *Nogueira* v. *New York, N.H. & H.R.R.*, 281 U.S. 128 (1930) (car float); *Kenny* v. *New York*, 108 F. 2d 958 (2nd Cir. 1940) (scow used as fireworks platform); *Offshore Company* v. *Robinson*, 266 F. 2d 769 (5th Cir. 1959) (submersible oil drilling rig); *Peck* v. *U. S. Steel Corp.*, 315 F. Supp. 905 (Minn.), aff'd 446 F. 2d 891 (8th Cir. 1970) (barge without motive power of its own); *Colby* v. *Todd Packing Co.*, 77 F. Supp. 956 (Alaska 1948) (floating fish trap of logs); *Miller* v. *Thomas M. Zowe, Jr. & Associates, Inc.*, 328 F. Supp. 54 (Ark. 1971) (16 foot flat bottomed boat); *Charles Barnes Co.* v. *One Dredge Boat*, 169 F. 895 (E.D. Ky. 1909) (floating structure supporting pump); *Guilbeau* v. *Falcon Seaboard Drilling Co.*, 215 F. Supp. 909 (La. 1963) (submersible oil drilling rig).

The test is simply whether or not the craft is used for transportation.

> *The General Cass,* Fed. Cas. No. 5307, p. 170 (E.D. Mich. 1871); *The Pioneer,* 30 F. 206 (E.D.N.Y. 1886).

Certainly the facts of this case indicate that the raft at bar qualified as a "vessel". It was repeatedly used to transport men and equipment over navigable waters. It was propelled by oar-like sticks operated by men aboard the raft, lines which were pulled or released by men aboard the raft and tugs which towed the raft.

A decision holding that a raft could not be a vessel as a matter of law would have the result of condoning the use of "makeshift" and perhaps unsuitable water craft in place of more seaworthy and substantial barges or scows. The defendant has used a "makeshift" vessel for economic reasons and now claims that this economy measure may constitute a method of avoiding liability for injuries.

> See generally *Brinegar* v. *Iron Ore Construction Company,* 302 F. Supp. 630 (E.D. Ark. 1969) (makeshift pontoon oil carrier held to be a vessel and therefore unseaworthy when capsized and paralyzed plaintiff.)

At the very least, the question of whether or not a raft it a vessel should be left to a jury sitting pursuant to the Jones Act.

> *Braniff* v. *Jackson Avt. — Gretna Terry, Inc.,* 280 F. 2d 523, 526-27 (5th Cir. 1960); *Offshore Drilling Company* v. *Robison,* supra.

II. THE PLAINTIFF'S CAUSE OF ACTION AGAINST THE BETHLEHEM STEEL CORPORATION AROSE WITHIN THE SCOPE OF ADMIRALTY AND MARITIME JURISDICTION, AND THE GENERAL MARITIME LAW SHOULD HAVE BEEN APPLIED.

(a) The raft was not ". . . . an extension of the pier, itself an extension of the land."

> *Powers* v. *Bethlehem Steel Corporation,* No. 72-1197, p. 8, (1st Cir. April 9, 1973).

A pier is defined as ". . . . a projecting quay, wharf, or other landing place."

> *The Haxby,* 94 F. 1016 (E.D. Pa. 1899). See also, 94 C.J.S. § 1; *John J. Lesnon Co.* v. *U. S.,* 182 F. 573 (9th Cir. 1910), cert. denied 220 U.S. 609 (1911).

There was no evidence before the Court of Appeals that suggested that the raft on which the plaintiff was injured was intended to be used as a "landing place". While it may be conceded for the purposes of this section of the argument that the aforesaid raft was not a vessel,

> *Cook* v. *Belden Concert Products, Inc.,* 472 F.2d 999 (5th Cir. 1973)

it is not conceded that it was part of a pier. As the Court of Appeals pointed out in its April 9, 1973 Opinion, the raft was often used as a work platform whose mission was unrelated to "landing" operations.

No case has been found by the petitioners which provides a precedent for "grafting" a raft to a pier. Even the *Cook* decision failed to go so far. In fact, the *Cook* decision only held that such a raft or work platform was

not a vessel. It did not hold that it was a pier or extension thereof.

The effect of the April 9, 1973 Opinion is undesirable in that it destroys uniformity of maritime law and encourages inconsistency of jurisdiction. In *Spratley* v. *Tidewater Construction Corporation,* 238 F. Supp. 650 (E.D. Va. 1965), a pile driver on a barge was permitted to proceed in admiralty. There was no attempt to graft the barge to the piles so as to remove admiralty jurisdiction. In *Biggs* v. *Norfolk Dredging Company,* 360 F.2d 360 (4th Cir. 1965), there was no suggestion that the barge serving as a work platform became part of the bridge. In *Grimes* v. *Raymond Concrete Pile Co.,* 256 U.S. 252 (1958), the Court did not even suggest that the barge was an extension of pilings driven into the ground. Consequently, all of these cases were permitted to proceed in admiralty.

See also *Stafford* v. *Perini Corporation,* 475 F.2d 507 (1st Cir. 1973); *Stanley* v. *Guy Scroggins Construction Co.,* 297 F. 2d 374 (5th Cir. 1961).

(b) Admiralty jurisdiction exists without the presence of a vessel.

One of the most significant differences between the plaintiff's case against McKie Lighter Co., Inc., and that against Bethlehem Steel Corporation was the necessity of proving the existence of a vessel. As against McKie, the plaintiff had to establish the presence of a vessel in order to claim crewmember status as well as a breach of the warranty of seaworthiness. As against Bethlehem, however, the plaintiff only had to demonstrate that his injury was sustained on navigable waters. The presence of a vessel was not required to invoke admiralty and maritime jurisdiction and the consequent application of the General Maritime Law for negligence.

It is well settled that admiralty jurisdiction in non-aviation cases depends solely on the situs of the injury.

Executive Jet Aviation, Inc. v. *City of Cleveland,* 409 U.S. 253 (1972); *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 (1971), reh. denied 92 S. Ct. 731 (1972); *Nacirema Operating Co., Inc.* v. *Johnson,* 396 U.S. 212 (1969), reh. denied 397 U.S. 929 (1970); *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469 (1922); *Atlantic Transport Co.* v. *Imbrovek,* 234 U.S. 52 (1913).

The presence of a vessel is not required.

Atlantic Transport Co. v. *Imbrovek,* supra; *Executive Jet Aviation, Inc.* v. *City of Cleveland,* supra.

It is sufficient that a "marine object" be involved.

McWilliams Dredging Co. v. *United States,* 105 F. Supp. 582 (E.D. La. 1952).

Accordingly, non-vessels such as floating pontoon wharves

The Bart Tully, 251 F. 856 (6th Cir. 1918)

floating dry docks

United States v. *Bruce Dry Dock Co.,* 65 F. 2d 938 (5th Cir. 1933)

floating elevators

The Hezekian Baldwin, 8 Ben. 556, Fed. Cas. No. 6449

and floating rafts

McWilliams Dredging Co. v. *United States,* supra at 588,

have been held to be the subject of admiralty and maritime jurisdiction. No decision cited by the Court of Appeals in its opinion of April 9, 1973 is contrary to this analysis.

Precedent cited in the *Cook* opinion is supportive of the above contention. The decision in *The Robert W. Parsons*, 191 U.S. 17 (1903), was relied upon heavily in *Cook* and is typical in reasoning. In that case, the Supreme Court was faced with the question of whether or not a canal boat was a vessel for the purpose of recognizing a maritime lien for dry dock repairs. In the course of resolving that issue, the Court considered first the nature of a vessel and second the extent of admiralty jurisdiction. With reference to the first issue, the Court found that floating dry docks, floating wharves, ferry bridges, gas floats and sailors' bethels were not vessels for the purposes of enforcing maritime liens. Since only a vessel could be the subject of a maritime lien, there was no object over which an Admiralty Court could exercise its jurisdiction.

With reference to the second issue, however, the Court expressly recognized that repairs performed on a floating dry dock were within admiralty jurisdiction as being performed on navigable waters. Even though the dry dock was not itself a vessel, activities performed on said dry dock were within admiralty jurisdiction.

(c) The plaintiff was associated with a maritime service and performing maritime activity.

The Supreme Court has recognized admiralty and maritime jurisdiction where there is a marine service,

Atlantic Transport Co. v. *Imbrovek*, supra at 61, 62.

or marine activity.

Executive Jet Aviation, Inc. v. *Cleveland, Ohio*, supra.

Ample evidence was either offered or introduced to establish both elements herein.

The plaintiff was engaged in servicing pilings supporting piers. Testimony of Willard Appley, an expert called by the plaintiff, was offered to the effect that it was the custom and practice of seamen to engage in such work. Said expert was also prepared to testify that such servicing was traditionally performed by seamen aboard scows, lighters, barges and other similar vessels. Said testimony was, however, excluded. Jack Ward, another expert called by the plaintiff, was prepared to testify that the rafts on which the plaintiff worked were used as if they were true vessels. This evidence was also excluded. The plaintiff was permitted to testify that the raft on which he was injured was moved over navigable waters almost daily and that he assisted in said navigation. Lastly, all construction work performed by the plaintiff promoted shipping activity in general through pier maintenance.

Cases previously adjudicated on the basis of similar evidence have included holdings that such activities could qualify a plaintiff as a seaman.

> *Biggs*, v. *Norfolk Dredging Company*, supra; *Grimes* v. *Raymond Concrete Piling Co.*, supra; *Sprately* v. *Tidewater Construction Corporation*, supra; *Stafford* v. *Perini Corp.*, supra; *Stanley* v. *Guy Scroggins Construction Co.*, supra.

Once qualified as a seaman, it is impossible to claim that the plaintiff lacked a nexus to maritime service or maritime activity. The acknowledged nature of a seaman's duties precludes such a claim. The plaintiff was performing a maritime service aboard a maritime object, a raft.

> Note that all of the aforecited cases involved vessels. However, the absence of a vessel in this action does not change the nature or quality of the plaintiff's actions. If such were the case, airplane personnel injured in transoceanic flight would be precluded from recovering in admiralty. See generally, *Hark* v. *Antilles Air Boats, Inc.*, 41 U.S.L.W. 2506-07 (V.I. 1973).

Even if the plaintiff were not performing seaman's duties aboard a vessel in navigation, he still fell within admiralty and maritime jurisdiction because he was engaged in a maritime activity and was hurt on navigable waters.

> See generally, *Grant Smith-Porter Ship Co.* v. *Rohde*, *Gonsalves* v. *Morse Dry Dock & Repair Co.*, supra.

As a result, the plaintiff as a construction worker injured on navigable waters while repairing piers was entitled to prosecute his causes of action in admiralty.

> See generally, *Hess* v. *United States*, 361 U.S. 314 (1960).

If the Court of Appeals is permitted to rule that this cause of action arose outside admiralty and maritime jurisdiction, that Court will destroy the uniformity within the General Maritime Law.

As considered previously, other pile drivers have been entitled to recover in admiralty given facts nearly identical to those established herein. The only distinction between those cases and the one at bar is that in those cases "vessels" were involved while in this case only a "raft" was present. All cases pertained to injuries sustained on navigable waters. All cases pertained to plaintiffs servicing piers positioned in navigable waters. For this Court to permit the Court of Appeals to abandon the "locality" test of admiralty jurisdiction and distinguish the maritime nature of the plaintiff's duties herein from those of other successful plaintiffs is not to look to maritime service or activity but solely to the presence of a vessel. This is

contrary to the present status of our jurisprudence and will destroy the uniformity so carefully molded by the Supreme Court.

Various hypothetical situations may fully demonstrate the problems created by the Opinion of the Court of Appeals. Assume that a vessel is standing off-shore waiting to dock at a pier. However, before the vessel may do so, the pier must be prepared by having fenders affixed to pilings. A seaman is sent from the vessel to affix said fenders. In order to perform his work, the seaman stands aboard a hastily constructed raft on the very waters where the vessel is to be docked. While performing his work on the raft and moving the raft from piling to piling, he is injured as a result of a defect in the raft and the negligence of the pier owner. According to the Opinion of April 9, 1973, this cause of action could not arise in admiralty.

Assume that a person is employed to erect a pier and had served prior to his employment as a pile driver aboard a steel hulled lighter two hundred feet long and seventy feet wide. On this occasion, he is ordered to drive piles from a raft two hundred feet long and seventy feet wide composed of logs. This raft is not designed in such a manner as to be capable of being navigated over great open stretches of water. However, the raft is repeatedly towed over open water. The raft is equipped with heavy pile driving equipment. On a certain day the raft is towed several hundred feet into a shipping channel and moored to a pile. More piles are then driven for the construction of a pier. While piles are being driven, the worker is injured as a result of a defect in the raft and the negligence of the owner of the pier. According to the Opinion of April 9, 1973, this cause of action would not arise in admiralty.

Both of the above hypotheticals pertain to injuries sus-

tained on navigable waters. Both of the above pertain to maritime service and activity. Neither of the above involve a "vessel" as defined in the Opinion of April 9, 1973. Both cases fell within admiralty jurisdiction prior to April 9, 1973. Both cases are now outside the scope of admiralty jurisdiction in the First Circuit. The petitioners can find no decisions in any other jurisdiction which reach a similar result.

IX

Conclusion

The United States Court of Appeals for the First Circuit has rendered a very significant decision which will have a confusing effect on Courts attempting to deal with admiralty and maritime jurisdiction. First, the decision will cause considerable confusion as to what constitutes a vessel. Second, the decision will cause an unreasonable restriction of admiralty and maritime jurisdiction as well as destroy the uniformity of admiralty law. As a result, it is respectfully submitted that the time has come when this Court should define the term "vessel" and guide the lower courts in delineating the scope of admiralty and maritime jurisdiction as it applies to injuries sustained on navigable waters.

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 69-941-C

DONALD E. POWERS

v.

BETHLEHEM STEEL CORPORATION

Civil Action No. 69-942-C

DONALD E. POWERS

v.

McKIE LIGHTER CO., INC.

OPINION

May 23, 1972

CAFFREY, Chief Judge

These two civil actions, both of which arose out of the same industrial accident, were consolidated for purposes of trial. A six-day jury trial was had and the defendants in both cases moved for a directed verdict pursuant to Rule 50, Federal Rules of Civil Procedure, both at the end of plaintiff's cases and at the conclusion of all the evidence. Both cases were submitted to a six-person jury under leave reserved and the jury returned a verdict for plaintiff in each case in the amount of $275,000. So much of the case as involved a claim-over by Bethlehem Steel against McKie Lighter in the event the jury found against Bethlehem was withdrawn from the consideration of the jury by stipulation of counsel for McKie and Bethlehem and submitted for determination by the Court.

Taking the evidence in the light most favorable to plaintiff, it appears that a contract was entered into between Bethlehem Steel and McKie Lighter on July 12, 1966.

The contract provided for McKie to do certain work to repair concrete pilings of Pier 3 and to repair and replace the fender system of Pier 2 at the Boston shipyard of Bethlehem Steel. Under the contract, McKie was to install concrete jackets on 53 concrete piles which supported the pier. This involved wire brushing all existing resteel and concrete surfaces coming in contact with the new work, installing removable steel and concrete forms, and furnishing and placing reenforcing steel and concrete.

Plaintiff Donald E. Powers is presently 38 years of age. At the time of the accident he was 33. He was then and is now a member of Local 56, Carpenters and Piledrivers Union. He has not at any material time ever been a member of the National Maritime Union. His employment as a piledriver immediately prior to his job at Bethlehem Steel involved piledriving work at the Boston City Hospital; in Harvard Square, Cambridge; and at the Merchants National Bank on State Street, Boston. There was no evidence that Mr. Powers did any work of any kind on the high seas or on or near the waterfront prior to the work at the Bethlehem shipyard. There was evidence that he and other employees of McKie had worked at the Bethlehem yard in 1966. Powers himself began working at Pier 2 in August of 1966, replacing fenders along the side of the pier. He also worked on Pier 3 during August and September 1966, as a member of a group of McKie employees who were replacing some condemned concrete pilings. The work continued through December of 1966, and part of this time Powers worked as McKie's foreman. When it became necessary for the McKie employees to work on the under-side of the pier, or on the side of the pilings which was accessible only from underneath the pier, they used either of two rafts as platforms. One raft was 4 feet wide and 25 feet long. The other was 10 feet wide and 25 feet long. They were

made of 12 x 12 timbers, lashed or bolted together. They had no decking or protective edge. It appears from the evidence that at all times during the performance of the contract these rafts were tied by lines either to the side of the pier or to pilings supporting the pier, and that they were maneuvered in under the pier and out alongside the pier by pulling on the lines or by hand-grabbing the pilings and pulling thereon while standing on the rafts. The line-pulling was done either by one or two men standing on the raft or by men standing on the pier. These rafts contained no means of self-propulsion, no power, no navigational equipment, no lights, no sleeping quarters, no permanently affixed equipment of any kind. Because of the shadow cast by the pier, artificial lighting was necessary to illuminate the area in which work was being done under the pier. For this purpose, extension lights were plugged into a source of electricity on the pier and allowed to dangle over either side of the pier. On the day of the accident, either Powers himself or one of his co-workers had plugged in two extension cords, owned and supplied by Bethlehem Steel, one of which was dropped over the harbor side and the other over the land side of Pier 3, at approximately the place where the two rafts were tied up and where the crew was about to begin working.

Shortly after six o'clock on the morning of October 6, 1967, Powers and Ward, another McKie employee, went down a ladder onto the 4′ x 25′ raft. Powers testified that as he stood on the raft an electric light bulb which was in a socket at the end of an electrical cable was approximately 10 to 12 feet directly over his head, that he looked up toward the bulb, and almost immediately thereafter the light bulb exploded causing several fragments to penetrate his left eye. After many hospitalizations at the Massachusetts Eye and Ear Infirmary this eye was enucleated.

Neither Powers nor anyone else who testified gave any evidence whatsoever as to the cause of the light bulb's exploding. Powers, however, did testify that during the many months in which he had previously worked on the Bethlehem Steel premises as an employee of McKie, other light bulbs had "popped" and that he was aware of several prior explosions.

I. *As to Bethlehem's Motion for a Directed Verdict*

There was no evidence adduced at the trial that any object of any kind struck the light bulb, that any force or trauma was applied to the light bulb from any exterior source, nor was there any evidence that the bulb itself ever touched the water or the harbor or any other substance or thing external to the bulb. There was likewise no evidence of any electric current abnormality, voltage drop, current increase, or any other occurrence which could be characterized as an electrical abnormality of any sort which could conceivably have contributed to the explosion of the light bulb. Nor was there any evidence on the basis of which a finding could be made that Bethlehem knew or should have known that this bulb would explode.

It is clear that the relationship between Bethlehem and plaintiff was that of an owner of land to an employee of an independent contractor hired by the landowner to do work on his premises. It is equally well-settled that in a diversity case the federal court will apply the law of the state in which it sits, including its law of Conflict of Laws. *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Sampson* v. *Channell*, 110 F.2d 754, 760-61 (1 Cir. 1940); *Juliano* v. *Hobart Mfg. Company*, 200 F. Supp. 453, aff'd. 303 F.2d 830 (1 Cir. 1961). There is no question but that a Massachusetts court would apply Massachusetts law to the facts of this case. *Lima* v. *Pennsylvania R. Co.*, 105 F. Supp. 97, 98 (D. Mass. 1952); *Strogoff* v. *Motor*

Sales, Inc., 302 Mass. 345, 347 (1939); *Restatement of Conflict of Laws, Second*, Ch. 7, sec. 146.

Recent Supreme Judicial Court decisions, including *Burr* v. *Massachusetts Electric Co.*, 356 Mass. 144 (1969) have reiterated the long standing rule that:

> "The defendant, thus, owed him the same duty as it owed its own employees, and that duty was to disclose hidden defects of which the defendant was aware or of which in the exercise of reasonable care it should have known. Except in cases of hidden defects, the employer owes no duty to alter the conditions where the work is to be done or to make them safe for the employee. *Williams* v. *United Men's Shop, Inc.*, 317 Mass. 319, 320; *Sparkes* v. *Kepnes*, 339 Mass. 349, 351." (p. 147.)

The Court, in *Burr*, then made an observation which is dispositive of the instant case (also at p. 147):

> "There was no hidden defect here. Burr knew of the existence and location of the wires; and even if not warned of their danger, he should have realized that they might be energized. There is no duty to warn of dangers which are obvious...."

On Powers' own testimony, he knew that light bulbs without reflectors or metal protective cages were being used on this job. He also knew and testified that these bulbs "popped" from time to time. There is no evidence as to what caused the bulb which injured him to pop, and there likewise is no evidence, direct or circumstantial, from which a finding could be made that any latent defect was involved herein since plaintiff himself testified to his awareness of the condition he now says caused his injury. Further, even if on some theory not apparent to this court a bulb which exploded for an unknown reason could be considered a latent defect within the meaning of Massachusetts law, the plaintiff still may not prevail as there

is not a scintilla of evidence in this case to form a basis for a finding that defendant knew, or with the exercise of reasonable care should have known, of its existence. Accord: *Gobern* v. *Metals and Controls, Inc.*, 418 F.2d 290 (1 Cir. 1969).

Paraphrasing the above-quoted language from *Burr* to fit the facts most favorable to plaintiff, the paragraph would read:

> "There was no hidden defect here. Powers knew of the existence, condition, and tendency to occasionally explode on the part of the unprotected light bulbs. There is no duty to warn of dangers which are obvious."

Accordingly, the motion of defendant Bethlehem Steel Corporation for a directed verdict is allowed.

II. *As to McKie's Motion for a Directed Verdict*

On the evidence in this case, the relationship between Powers and McKie was that of employee and employer, and it is clear that based on this relationship Powers filed a claim against McKie pursuant to the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. §901, et seq. It is also clear that Powers received an award pursuant to his claim for compensation as a harborworkers in the amount of approximately $39,000. A portion of the Longshoremen's and Harborworkers' Act, 33 U.S.C. §905, provides in pertinent part:

> "The liability of an employer prescribed in §904 of this title shall be *exclusive* and *in place of* all other liability of such employer to the employee." (Emphasis added.)

If this plain language of Congress means anything at all, it means that a person in the position of the plaintiff herein who files a claim for compensation *qua* harborworker, who testifies at that hearing under oath (as Powers while under cross-examination admitted he did) that he

told the Commissioner who conducted the hearing on his compensation claim that he always was a piledriver, has precluded himself from thereafter seeking to enforce any other type of liability upon his employer. In short, the statute provides that having exercised rights under the Longshoremen's and Harborworkers' Compensation Act, plaintiff has made what Congress has ordained to be a binding election among possible remedies. That plaintiff and his counsel should realize the binding nature over and above the direct and unambiguous language of 33 U.S.C. §905 quoted above, is further evidenced by the language in §903(a), Title 33, which states in relevant part:

> "No compensation shall be payable in respect of the disability or death of (1) a master or member of a crew of any vessel."

If Powers was, in fact, a member of a crew of a vessel at the time of the accident, this supposed fact was certainly known both to Powers and his counsel at the time he or they made the decision to pursue his remedies under the Longshoremen's and Harborworkers' Compensation Act and seek a remedy which Congress had withheld from seamen.

That remedies to a single plaintiff against his employer are not available under both the Jones Act and the Longshoremen's and Harborworkers' Compensation Act has been specifically held by the Court of Appeals for the Fifth Circuit in *Bodden* v. *Coordinated Caribbean Transport, Inc.*, 369 F.2d 273 (1966). See, also, *Moore Dry Dock* v. *Pillsbury*, 100 F.2d 245, 247 (9 Cir. 1938); and *Dixon* v. *Oosting*, 238 F. Supp. 25, 27 n.1 (E.D. Va. 1965). The Court of Appeals for the Fifth Circuit likewise has ruled that a longshoreman who has recovered against his employer under the Compensation Act may not thereafter impose Jones Act liability upon his employer. *Ocean*

Drilling & Express Co. v. *Berry Bros. Oilfield Service*, 377 F.2d 511 (5 Cir. 1967).

Substantially the same ruling, adverse to petitioner, was handed down as the law in this Circuit in *DeMartino* v. *Bethlehem Steel Co.*, 164 F.2d 177 (1 Cir. 1947), a case in which the Court of Appeals ruled, in substance, that exercising the option to impose liability on one's employer under the Compensation Act is a legally binding election which precludes subsequent resort to the Jones Act as against the employer.

Over and above the statutory preclusion just discussed, and as a separate, independent and additional ground for this decision, I rule that there was no evidence on the basis of which plaintiff could be found by a jury to have been a seaman or to have been engaged in work on a vessel. It is well-established law that whether or not a person is a seaman depends on the nature of his duties and whether or not they are maritime in character. *Gale* v. *Union Bag & Paper Co.*, 116 F.2d 27 (5 Cir. 1940). Plaintiff's duties are described as follows in the contract between his employer and Bethlehem Steel:

> "... (McKie Lighter) shall provide for but not limited to the installation of concrete jackets on 53 concrete piles ... consisting of wire brushing of all existing resteel and concrete surfaces coming in contact with the new work, the furnishing and installation of removable steel and concrete forms, the furnishing and placing of all reinforcing steel and concrete, the furnishing and installation of all expansion bolts, wire mesh and other accessories ... necessary to complete the work...."

Applying the test of the *Gale* case, as well as the test set out in *Bodden, supra,* no finding that plaintiff was a seaman could be allowed to stand on the record of this case. In *Swanson* v. *Mara Bros.*, 328 U.S. 1, 5 (1945), the

Supreme Court ruled that in order to recover under the Jones Act the plaintiff must be "a member of a crew of a vessel," and further, that "the ship must be in navigation," that the plaintiff must have a more or less permanent connection with the ship and that his work must be aboard the vessel primarily to aid in the navigation of the ship. Applying these standards to the instant case, it is beyond the stretch of any rational imagination that a 25′ x 4′ x 1′ raft permanently tied to a pier by lines could be considered a ship, in or out of navigation. It is equally clear that plaintiff could not be found to have had a more or less permanent connection with the raft, even if it could be found to be a ship, and the above-quoted contract provisions make it crystal-clear that plaintiff's duties were not primarily to aid in the navigation of the "ship."

Accordingly, because of the statutory provisions and because plaintiff could not be found to be a seaman serving as a member of a crew of a ship, the motion of defendant McKie Lighter Co., Inc. for a directed verdict is also allowed.

The claim-over by Bethlehem Steel against McKie Lighter is dismissed as moot by reason of the allowance of Bethlehem's motion for a directed verdict.

Judgment for the defendants.

(s) Andrew A. Caffrey
Chief Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 69-941-C

DONALD E. POWERS

v.

BETHLEHEM STEEL CORPORATION

Civil Action No. 69-942-C

DONALD E. POWERS

v.

McKIE LIGHTER CO., INC.

JUDGMENT

May 23, 1972

In accordance with Opinion filed this date allowing defendants' motions for a directed verdict in both the above-captioned cases, it is

ORDERED:

Complaints dismissed and judgment for the defendant in each case.

By the Court,

(s) HOPE K. CONNELL

Deputy Clerk

(s) ANDREW A. CAFFREY

ANDREW A. CAFFREY

Chief Judge

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 72-1197

DONALD E. POWERS,
PLAINTIFF, APPELLANT,
v.
BETHLEHEM STEEL CORPORATION,
DEFENDANT, APPELLEE,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, APPELLEE.

No. 72-1198

DONALD E. POWERS,
PLAINTIFF, APPELLANT,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge,*
ALDRICH and CAMPBELL, *Circuit Judges.*

Michael B. Latti, with whom *Robert S. Wolfe* and *Kaplan, Latti and Flannery* were on brief, for appellant.
Leo F. Glynn for appellee, McKie Lighter Co., Inc.
Charles E. Colson, with whom *Cargill, Masterman & Cahill* was on brief, for appellee, Bethlehem Steel Corporation.

April 9, 1973

CAMPBELL, *Circuit Judge.* Appellant Powers, a pile driver employed by McKie Lighter Co., suffered a serious eye

injury as he stood on a McKie-owned raft next to Pier 3 of the Bethlehem shipyard in Boston. McKie was under contract with Bethlehem Steel Corporation, the owner of the pier, to repair the pilings underneath. Powers, who received compensation for the injury under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, commenced separate actions in the district court against McKie, claiming damages under the Jones Act, 46 U.S.C. § 688, and damages and maintenance and cure under general maritime law; and against Bethlehem, under diversity jurisdiction, claiming damages for negligence. The jury returned substantial verdicts against both defendants, jointly and severally. Powers appeals from the district court's entry of judgments notwithstanding the verdicts in favor of both defendants.

Standing under the pier on a raft or "float" owned by McKie, Powers and other workmen would first clean the piles by chipping and sandblasting, and then place a form around them into which concrete would be poured. The raft was about twenty-five feet long and five feet wide. Without deck or railing, it was made of 12 by 12 timbers, bonded together. There were rings for lines at its four corners. The men would descend by ladder to the raft, which when not in use lay tied to the pier, lower to the raft sandblasting equipment, water pumps, and forms to be placed around the pilings, and move the raft under the pier to the piles by poling or pulling on lines attached to the pier. They would tie the raft to a larger raft on opposite sides of a row of piles, and span the rafts with planks, so that they could move between and work around the piles. Lines containing water, air, steam and electricity for cleaning, sandblasting and lighting were led from the pier by the men on the raft to where they were working.

The pier was thirty to forty feet wide. The raft's only movement was from the pier front to the piles underneath

or from one row of piles to another. Even when so moving it was normally attached by at least one line to the pier.[1] It had earlier been towed by a workboat to Pier 3 from Pier 2 and had also been towed through Boston harbor to other jobs.

The lighting for the work area, supplied by Bethlehem, consisted of drop lines with a male plug at one end, plugged into a fuse box, and a socket at the other with a bulb in it. The line would be slung over the side of the pier, and taken under the pier by a workman. Some but not all of the bulbs had reflectors. None had protective covering around them. The bulbs had popped frequently while the men worked, sometimes when Bethlehem supervising employees were present. As late as the week of the accident, a bulb had popped in their presence. Powers had twice complained to the Bethlehem job supervisor, recommending that the bulbs be surrounded with a steel or wire cage, with a piece of plexiglass enclosure. There is no evidence of what response Powers received, if any.

The accident happened before daylight, as Powers, standing on the raft, then attached to the pier, was preparing to move it about twenty feet to piles under the pier.[2] The light cable, supplied by a Bethlehem employee to a McKie employee, lay hanging over the side of the pier, the bulb about ten to thirteen feet above Powers' eye level. The bulb was unprotected. When Powers looked up toward the light, the bulb popped, sending pieces of glass into his eye.

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[1] Sometimes, men on the pier would hold a line to guide the raft under the pier. There was a suggestion in the testimony that at a point when the raft was moving under the pier the man on the pier would drop the line to a man on the raft, but it is clear from the testimony that the raft was unattached to the pier, if at all, for only a matter of minutes.

[2] There is some suggestion in testimony that the raft may actually have commenced its movement under the pier.

This case is one more taking us literally to the water's edge, having to do with the circumstances under which a harbor-worker may become entitled to a seaman's remedies. *See Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971). Recovery under the Jones Act or under the general maritime law for unseaworthiness requires affiliation with a "vessel"—either as a crew member or as one injured aboard doing seaman's work. *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1, 4, 7 (1946); *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85, 99 (1946). We believe the raft upon which Powers was injured was not a vessel.

What is a vessel, like who is a crew member, is "except in rare cases", a jury question. *Offshore Company* v. *Robison*, 266 F.2d 769, 780 (5th Cir. 1959). Nevertheless, the broad parameters of definition must be established if the terms are to have content. If what emerges from facts and inferences taken most favorably to the plaintiff[3] cannot be a vessel, the jury may not make it one. *See Thibodeaux* v. *J. Ray McDermott & Co.*, 276 F.2d 42, 46 (5th Cir. 1960); *Hill* v. *Diamond*, 311 F.2d 789, 792-3 (4th Cir. 1962); *Texas Company* v. *Savoie*, 240 F.2d 674, 675 (5th Cir. 1957); *rehearing denied*, 242 F.2d 667 (5th Cir. 1957); *cert. denied* 355 U.S. 840 (1957).

We agree with the 5th Circuit in *Cook* v. *Belden Concrete Products, Inc.*, F.2d , 41 U.S.L.W. 2406 (5th Cir. Jan. 12, 1973), that a floating construction platform secured to land is not a vessel for purposes either of the Jones Act or general maritime law. The non-vessel in *Cook* was a flat-deck barge, 180 by 54 feet, upon which employees fabricated concrete barges. Equipped with pipes and pumps for flooding or evacuating interior compart-

[3] We have considered the evidence in the light most favorable to appellant, including evidence made as an offer of proof after exclusion by the court, and give him the benefit of every favorable inference. *Rainey* v. *Gay's Express, Inc.*, 275 F.2d 450, 451 (1st Cir. 1960).

ments, but without its own propulsion, it was occasionally moved to different positions alongside the dock to pick up materials, would be towed into deeper water to launch completed barges, and had been towed considerable distances. While barges were being fabricated, it was fastened by ropes to the dock. The court said, slip opinion, at 4:

> .... in the instant case the floating construction platform was capable of limited movement and was, in the normal course of its service, towed from point-to-point in navigable waters.... The permanence of fixation, however, is not the criterion which governs the maritime status of floating dry docks and similar structures. As the Supreme Court pointed out in *The Robert W. Parsons* [191 U.S. 17, 30 (1903)] the "determinative factors upon the question of jurisdiction [are] the purpose for which the craft was constructed and the business in which it is engaged"....

Cook, supra, relied on cases emanating from *Cope* v. *Vallette Dry-Dock Company*, 119 U.S. 625, 627 (1887), that a floating dry-dock is not a vessel. *See Atkins* v. *Greenville Shipbuilding Corp.*, 411 F.2d 279, 283 (5th Cir. 1969), *cert. denied* 396 U.S. 846 (1969).[4] In our own case of *DeMartino* v. *Bethlehem Steel Co.*, 164 F.2d 177, 179 (1st Cir. 1947), holding that a floating dock was not a

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[4] Somewhat related is the Supreme Court's classification of a so-called wharf boat as a non-vessel. *Evansville & Bowling Green Packet Co.* v. *Chero Cola Co.*, 271 U.S. 19 (1926). Secured to the shore, with quarters for men aboard and shore based power and plumbing connections, the huge craft was towed each winter to a more sheltered harbor, and had sometimes been towed considerable distances. The statutory "vessel" definition under consideration in that case—"every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water"—was virtually the same as that in 46 U.S. § 801, arguably applicable to Jones Act cases. *See* 7A Moore's Federal Practice ¶ .215[4]. The quoted language has never been construed as meaning simply every floating object capable of bearing weight without sinking. *See*, e.g., *Hill* v. *Diamond*, *supra*, 311 F.2d at 792-3.

vessel, we cited *Berton* v. *Tietjen & Lang Dry Dock Co.*, 219 F. 763 (D. N.J. 1915), in which, at 771, the court said,

> ... A stage designed to be used in connection with painting or repairing the side of a vessel would not become [a vessel] merely because it was capable of floating on water, though it were used by workmen in thus painting and repairing, while the same was on the water, rising and falling with the tide, or because it could be moved alongside or around such a vessel, and while being moved was capable of holding such persons and property....

The purpose and business of the present craft was not the transportation of passengers, cargo, or equipment from place to place across navigable waters. It was tied to the pier or its pilings virtually all of the time. Nearly as long as the pier was wide, it was used to provide a stable platform for men repairing defective piles. While so used, it was lashed with the other raft to piles, planks being placed from raft to raft, and was indistinguishable from a permanent floating dock. *See DeMartino* v. *Bethlehem, supra.* Its brief movement consisted of being hauled, poled or paddled from the pier to the piles underneath, or from pile to pile; even when moving it was usually attached to the pier by one or more lines. Its occasional "voyages" —when towed by workboat from one pier to another—were no different from the dragging of a section of floating dock from one location to another. *See Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co., supra,* 271 U.S. at 20-21; *Cook, supra,* slip opinion, at 4-5, n. 5.

Rafts, of course, may be designed or used "to encounter perils of navigation" (*See Evansville* v. *Chero Cola Co., supra,* at 22); if so they may be vessels. *See The Mary,* 123 F. 609 (S.D. Ala. 1903); *United States* v. *Marthinson,* 58 F. 765 (E.D.S.C. 1893); *Seabrook* v. *Raft of Railroad*

Cross-Ties, 40 F. 596 (D.S.C. 1889). But we cannot reasonably describe the present raft as other than a floating stage. Even with men and equipment on it, its movement, amounting mostly to a positioning under the pier incidental to its intended use, was not navigation.

The raft, moreover, was unlike special purpose floating structures whose function requires exposure to the hazards of the sea usually at some distance from the shore, such as barges, dredges, drilling platforms and floating derricks. *See Offshore Company* v. *Robison, supra*, 266 F.2d at 772 (mobile drilling platform with retractable legs, having a raked bow, navigation lights, bitts, anchors, bilge pumps, cranes, and life rafts, located at the time of the accident three miles offshore); *Summerlin* v. *Massman Const. Co. et al.*, 199 F.2d 715, 716 (4th Cir. 1952) (derrick anchored in a river); *Gahagan Const. Corporation* v. *Armao*, 165 F.2d 301, 305 (1st Cir. 1948) (dredge on which crew slept and ate). *Also compare Stafford* v. *Perini Corporation*, No. 71-1221 (1st Cir. March 20, 1973) (construction barge anchored two miles offshore, assumed to be vessel). These navigable craft, like conventional vessels, retain their status even when berthed for long periods or even when resting upon or attached to the bottom. *See Gianfala* v. *Texas Company*, 350 U.S. 879 (1955), *reversing Texas Company* v. *Gianfala*, 222 F.2d 382 (5th Cir. 1955).

It may well be that when a craft not designed or generally used as a vessel is in actual navigation—such as when, unattached to land, it is under tow for an appreciable distance over navigable water—it will temporarily acquire a vessel's status. *See United States* v. *Moran Towing & Transportation Co.*, 374 F.2d 656 (4th Cir. 1967), *Cook, supra*. However, even were the jury on conflicting evidence to have concluded that Powers' injury occurred while the raft was in process of being hauled under the pier, we do

not consider such movement to be navigation.[5] Attached by a line to the pier, the raft remained a work platform while being so maneuvered into position, a distance of about twenty feet. We sustain judgment for McKie.[6]

We next consider whether appellant may be allowed to recover against Bethlehem. We do not agree with him that Bethlehem's negligence is to be determined under general maritime law. *See Kermarec* v. *Compagnie General*, 358 U.S. 625, 628 (1959); *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255, 259 (1922). Maritime law applies only where the wrong occurring on or over navigable waters "bear[s] a significant relationship to traditional maritime activity." *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 41 U.S. L.W. 4085, 4091 (U.S. Dec. 18, 1972). It would be incongruous to hold that the required relationship existed here, in the face of our conclusion that the raft was not a vessel, but, being a floating work platform, was, in effect, an extension of the pier, itself an extension of the land. *See Victory Carriers, Inc.* v. *Law*, *supra*, 404 U.S. at 206-7. Powers, a landbased piledriver, employed to repair piles from the platform, was injured by a bulb hanging over the pier.

---

[5] Besides the short distance from pier to pilings, and the fact the raft remained attached to the pier, we note that piers and docks have traditionally been "deemed extensions of land". *Victory Carriers* v. *Law*, *supra*, 404 U.S. at 206-7. To term movement thereunder of this sort "navigation" would seem as strained as to call the raft a "vessel" or Powers its "crew".

[6] The district court erred in ruling alternatively that § 905 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 901 *et seq.*, barred Powers' action against McKie because Powers had collected compensation and had testified in support of his compensation claim. It was settled, at least before amendment in October, 1972, that § 905 did not bar a longshoreman or harbor worker's action against his employer, who owned the vessel where the injury occurred, despite the worker's having collected compensation. *Reed* v. *The Yaka*, 373 U.S. 410 (1963); *Jackson* v. *Lykes Steamship Co.*, 386 U.S. 731 (1967); *Biggs* v. *Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966). *But see* Pub. Law 92-576, 82 Stat. 1251, § 18(a) (1972), amending § 905.

We see nothing either in his occupation or in the circumstance of the accident to invoke the law of admiralty, "designed and molded to handle problems of vessels relegated to ply the waterways of the world." *Executive Jet Aviation, Inc.* v. *City of Cleveland, supra,* 41 U.S.L.W. at 4092.

We thus turn to whether under Massachusetts law the jury could have found that Bethlehem violated a duty owed Powers. A Massachusetts landowner owes to the employees of an independent contractor only the same duty he owes his own employees, "and that duty [is] to disclose hidden defects of which the defendant was aware or of which in the exercise of reasonable care it should have known. Except in cases of hidden defects, the employer owes no duty to alter the conditions where the work is to be done or to make them safe for the employee." *Burr* v. *Massachusetts Electric Company,* 356 Mass. 144, 147, 248 N.E. 2d 492, 495 (1969).[7] This rule, now mitigated in virtually all cases (as in Powers') by comprehensive workmen's compensation laws, was established in an earlier era when the cost of industrial accidents was but rarely imposed on an employer. Whatever its shortcomings, we are bound by it. The defect in the light bulb was not hidden; Powers had noticed bulbs popping and had in fact complained about the danger to Bethlehem employees. That appellant had not seen the light bulb which exploded is unimportant, given his familiarity with the bulbs' propensity to pop and their lack of shielding.[8]

---

[7] *See also Barrett* v. *Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971); *DeMartin* v. *New York, New Haven & H. R.R. Co.*, 336 Mass. 261, 143 N.E.2d 542 (1957); *Hannon* v. *Hayes-Bickford Lunch System, Inc.*, 336 Mass. 268, 145 N.E. 2d 191 (1957); *Gallo* v. *Leahy*, 297 Mass. 265, 8 N.E. 2d 782 (1937); *Faverau* v. *Gabele*, 262 Mass. 118, 159 N.E. 738 (1928).

[8] Powers' earlier unheeded requests for shielding indicated that he knew of the likelihood of danger as well as of the possibility of the bulbs' popping. Restatement of Agency 2d, § 521, comment b; § 522.

Appellant's argument that Bethlehem violated a duty to supply safe equipment must fail also, since recovery would depend on Powers' not knowing that the equipment was defective. *Cf. Mulchey* v. *Methodist Religious Society*, 125 Mass. 487, 489 (1878); *White* v. *Newborg*, 208 Mass. 279, 281, 94 N.E. 269, 270 (1911). *See* Restatement of Torts 2d § 496A, comment c(3), § 496C. We thus affirm the judgment for Bethlehem against Powers.

We find merit in none of the appellant's remaining contentions, dealing mostly with the exclusion of evidence at trial. The verdict in his favor cured any possible prejudice before the jury. We ourselves have considered and, for purposes of this decision have accepted in its aspect most favorable to appellant, the excluded proof relative to the status of the raft. Other exclusions, such as of certain evidence relative to his alleged crew status, were harmless in view of our conclusion that the raft was not a vessel. Given our disposition of the case, the district court's unwillingness to allow appellant to amend the complaint could not have been prejudicial.

Affirmed.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 72-1197.

DONALD E. POWERS,
PLAINTIFF, APPELLANT,
v.
BETHLEHEM STEEL CORPORATION,
DEFENDANT, APPELLEE,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, APPELLEE.

JUDGMENT
Entered: April 9, 1973

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. Latti, Glynn and Colson.]

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 72-1198.

DONALD E. POWERS,
PLAINTIFF, APPELLANT,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, APPELLEE.

JUDGMENT
Entered: April 9, 1973

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. Latti, Glynn and Colson.]

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 72-1197

DONALD E. POWERS

v.

BETHLEHEM STEEL CORP.

v.

McKIE LIGHTER CO., INC.

GENERAL DOCKET

1972

June 9 Record on appeal in two volumes filed and case docketed.

14 Appearance of Michael B. Latti, for the appellant filed. Motion filed. Order (Aldrich, Ch.J.) enlarging the time for filing statement of issues and designation to October 6, 1972, and enlarging the time for filing appendix and brief for appellant to November 1, 1972. Notices mailed.

19 Appearances of Charles E. Colson and Cargill, Masterman & Cahill for appellee Bethlehem Steel Corp. filed.

23 Appearance of Leo F. Glynn for appellee McKie Lighter Co. filed.

Sept. 8 Motion filed. Order (Coffin, Ch.J.) further enlarging time for filing statement & designation to 11/3/72 and for filing brief for appellant & appendix to 11/27/72. Notices mailed.

12 Supplement to record on appeal consisting of five volumes of transcripts filed.

1972

Oct. 5 Motion filed. Order (Coffin, Ch.J.) granting leave to appellant to file a consolidated brief and appendix in this case and in case No. 72-1198. Notices mailed.

17 Supplement to record on appeal consisting of one volume of transcript filed.

27 Statement and designation filed.

Nov. 14 Motion filed. Order (Coffin, Ch.J.) granting leave to Blanchard Press to withdraw temporarily a certain exhibit. Notices mailed.

22 Supplement to record on appeal consisting of certain documents filed.

27 Brief for appellant and appendix in one volume filed.

Dec. 14 Brief for appellee Bethlehem Steel Corp. filed.

18 Brief for appellee McKie Lighter filed.

22 Reply brief for appellant filed.

26 Assigned for hearing at the coming January 1973 session.

1973

Jan. 2 Heard before Coffin, Aldrich and Campbell, JJ.

Apr. 9 Judgment: The judgment of the district court is affirmed. Opinion by Campbell, J. Notices mailed.

18 Verified bill of costs filed by appellee Bethlehem Steel.

19 Verified bill of costs filed by appellee McKie Lighter Co.

23 Petition for rehearing filed.

May 10 Memorandum and Order (Coffin, Aldrich & Campbell, JJ.) denying petition for rehearing. Notices mailed.

17 Taxation of costs filed. Mandate issued, copy filed and original papers returned to the district court. Notices mailed.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 72-1198

DONALD E. POWERS
v.
McKIE LIGHTER CO., INC.

GENERAL DOCKET

1972

June 9 Record on appeal in one volume filed and case docketed.

14 Appearance of Michael B. Latti, for the appellant filed. Motion filed. Order (Aldrich, Ch.J.) enlarging time for filing the statement and designation to October 6, 1972, and enlarging the time for filing appendix and brief for appellant to November 1, 1972. Notices mailed.

23 Appearance of Leo F. Glynn for appellee filed.

Oct. 3 Motion filed. Order (Coffin, Ch.J.) further enlarging times for filing statement & designation to November 3, 1972 and for filing brief for appellant & appendix to November 27, 1972. Notices mailed.

5 Motion filed. Order (Coffin, Ch.J.) granting leave to appellant to file a consolidated brief and appendix in this case and in case No. 72-1197. Notices mailed.

17 Supplement to record on appeal consisting of one volume of transcript filed.

27 Statement and designation filed.

Nov. 7 Counter-designation filed.

22 Supplement to record on appeal consisting of certain documents filed.

1972

27 Brief for appellant and appendix in one volume filed.

Dec. 18 Brief for appellee McKie Lighter filed.

22 Reply brief for appellant filed.

26 Assigned for hearing at the coming January 1973 session.

1973

Jan. 2 Heard before Coffin, Aldrich and Campbell, JJ.

Apr. 9 Judgment: The judgment of the district court is affirmed. Opinion by Campbell, J. Notices mailed.

19 Verified bill of costs filed by appellee.

23 Petition for rehearing filed.

May 10 Memorandum and Order (Coffin, Aldrich & Campbell, JJ.) denying petition for rehearing. Notices mailed.

17 Taxation of costs filed. Mandate issued, copy filed and original papers returned to the district court. Notices mailed.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1197.

DONALD E. POWERS,
PLAINTIFF, APPELLANT,
v.
BETHLEHEM STEEL CORPORATION,
DEFENDANT, APPELLEE,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, APPELLEE.

No. 72-1198.

DONALD E. POWERS,
PLAINTIFF, APPELLANT,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, APPELLEE.

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

MEMORANDUM AND ORDER
Entered: May 10, 1973

Plaintiff's petition for rehearing addressed to the case against Bethlehem merely seeks to reargue what we plainly understood to be advanced before. Our reliance upon *Executive Jet* could scarcely have caused surprise. It was cited by plaintiff in his supplemental brief, and discussed at oral argument. We were, of course, aware that that case related to an aviation accident; however, its statement of principles relative to the "purely mechanical application

of the locality test" does not stop there. *See* 409 U.S. at 253-261. The cases cited by petitioner, most of them involving vessels or otherwise showing a maritime relationship, do not establish the rule which petitioner would have us adopt—namely, that in non-aviation cases locality is the sole test for determining jurisdiction. The Supreme Court has not so held (*Executive Jet*, 409 U.S. at 258) and any such rule would clearly be inconsistent with the principles of *Executive Jet*. Plaintiff's hypotheticals, better described as "horribles", reach distorted results not dictated by anything said or implied in our opinion.

We adhere to our conclusion that on the facts of this case, even though plaintiff harbor worker was standing on a floating construction platform or raft, making repairs to and receiving injuries from a land connected pier was not traditional maritime activity.

The second ground for the petition is that, allegedly, we erred in stating that none of the bulbs "had protective covering around them." This was plaintiff's own testimony to the jury—"no protective shield, no protective covering." It is true that another witness testified that some bulbs had a "squirrel cage." Such a cage was manifestly to prevent outside trauma to the bulb, not to protect against broken slivers of glass from a spontaneously exploding bulb. But apart from this, Bethlehem did not place the particular lights; it was in a poorer position than plaintiff to know which kind were where. We see nothing which would cause us to alter our previous analysis.

The petition for rehearing is denied.

Enter:

(s) Levin H. Campbell

By the Court:

(s) Dana H. Gallup

Clerk.

[cc: Messrs. Latti, Colson and Glynn.]

AUG 22 197
MICHAEL RODAK, JR.

Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 73-86.

DONALD E. POWERS,
PLAINTIFF, PETITIONER,

v.

BETHLEHEM STEEL CORPORATION,
DEFENDANT, RESPONDENT,

v.

McKIE LIGHTER CO., INC.,
DEFENDANT, RESPONDENT,

AND

DONALD E. POWERS,
PLAINTIFF, PETITIONER,

v.

McKIE LIGHTER CO., INC.,
DEFENDANT, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Table of Contents.

Statement of the case	1
Questions presented	7
Summary of argument	8
Argument	11
I. No conflict exists with the decision of another Court of Appeals	11
II. No conflict exists between the decision of the District Court and the Court of Appeals in the present case, and any District Court opinion	14
III. No important question of federal law is presented by the present case	21
IV. The decision does not conflict with any applicable decision of the United States Supreme Court	23
V. No case has been cited in the Petitioner's argument which is material to the case at bar	24
VI. No conflict exists concerning the applicable law between the decisions below and any established precedents	33
VII. No ground for the considerations cited by Rule 19 is presented	42
Conclusion	43

Table of Authorities Cited.

Cases.

Atlantic Transport Co. v Imbrovek, 234 U.S. 52 (1913)	38
The Bart Tully, 251 F. 856 (6th Cir. 1918)	20
Berton v Tietjen & Lang Dry Dock Co., 219 F. 763 (N.J. 1915)	19

Biggs v Norfolk Dredging Company, 360 F2d 360 (4th Cir. 1965) 19, 34

Braniff v Jackson Ave.-Gretna Ferry, Inc., 280 F2d 523 (5th Cir. 1960) 32

Brinegar v Iron Ore Construction Company, 302 F. Supp. 630 (E.D. Ark. 1969) 32

Charles Barnes Co. v One Dredge Boat, 169 F. 895 (E.D. Ky. 1909) 16

Carumbo v Cape Cod Steamship Company, 123 F2d 991 (1st Cir. 1941) 17

Chesapeake & O. Ry. Co. v Thomason, 6 Cir., 70 F2d 860 40

Colby v Todd Packing Co., 77 F. Supp. 956 (Alaska 1948) 29

Cook v Belden Concrete Products, Inc., 471 F2d 999 (5th Cir. 1973) 14

Cope v. Vallette Dry Dock Co., 119 U.S. 625 26, 27

Detroit, T & I R Co. v Banning, 173 F2d 752 40

Evansville & Bowling Green Packet Co. v Chero Cola Bottling Co., 271 U.S. 19 (1926) 10 et seq.

Executive Jet Aviation, Inc. v City of Cleveland, 409 U.S. 249 (1972) 7 et seq.

The General Cass, Fed. Cas. No. 5307, P. 170 (E.D. Mich. 1871) 31

Grant Smith-Porter Ship Co. v Rohde, 257 U.S. 469 (1922) 37

Grimes v Raymond Concrete Pile Co., 356 U.S. 252 (1958) 9, 10, 24, 35

Guilbeau v Falcon Seaboard Drilling Co., 215 F. Supp. 909 (La. 1963) 30

Gutierrez v Waterman Steamship Corporation , 10 L.Ed. 297 2d (1963) 37

Hark v Antilles Air Boats, Inc., 41 U.S.L.W. 2506-07 (V.I. 1973) 22

Hess v United States, 361 U.S. 314 (1960) 39

The Hezekiam Baldwin, 8 Ben. 556, 12 Fed. Cas. No. 6449 38

Kenny v New York, 108 F2d 958 (2nd Cir. 1940) 12, 14, 26

Knapp, Stout & Co. v McCaffrey, 177 U.S. 638 (1899) 23

Maltby v Steam Derrick Boat, 16 Fed. Cases, 564 29

McGuire v City of New York, 192 F. Supp. 866 (S.D. N.Y. 1961) 36

McWilliams Dredging Co. v United States, 105 F. Supp. 582 (E.D. La. 1952) 38

Moores v Louisville Underwriters, 14 F. 226 (W.D. Tenn. 1882) 19

Muntz v A Raft of Timber, 15 F. 555 (E.D. La. 1883) 15

Nacirema Operating Co., Inc. v Johnson, 396 U.S. 212 (1969), reh. den. 397 U.S. 929 (1970) 37

New Bedford Dry Dock v Purdy, 258 U.S. 96 (1922) 23

Nogueira v New York, N.H. & H. R.R., 281 U.S. 128 (1930) 23

Offshore Company v Robinson, 266 F2d 769 (5th Cir. 1959) 29

Peck v U. S. Steel Corp., 315 F. Supp. 905 (Minn.), aff'd. 446 F2d 891 (8th Cir. 1970) 14

People v Gotshall, 123 Mich. 474, 82 N.W. 274 40

The Pioneer, 30 F. 206 (E.D. N.Y. 1886) 31

Pleason v Gulfport Shipbuilding Corporation, 221 F2d 621 (5th Cir. 1955) 25

Raft of Cypress Logs, Fed. Cas. No. 11,527 (W.D. Tenn. 1882) 18

The Robert W. Parsons, 181 U.S. 17 (1903) 39

Seabrook v Raft of Railroad Ties, 40 F. 596 (S.C. 1889) 15

Spiller v Thomas M. Lowe, Jr. & Associates, Inc., 328 F. Supp. 54 (Ark. 1971) 30

Spratley v Tidewater Construction Corporation, 238 F. Supp. 650 (E.D. Va. 1965) 33

Stafford v Perini Corporation, 475 F2d 507 (1st Cir. 1973) 19, 34

Stanley v Guy Scroggins Construction Co., 297 F2d 374 (5th Cir. 1961) 10, 20, 34

Swanson v Marra, 328 U.S. 1 (1945) 17

Thibodeaux v J. Ray McDermott & Co., 276 F2d 42 (5th Cir. 1960) 18

Trask v Boston & Maine R.R., 219 Mass. 410, 106 N.E. 1022 40

Tregoning Boat Co. v United States, 15 Cust. Ct. 196, C. O. 971 (1945) 16

United States v Bruce Dry Dock Co., 65 F2d 938 (5th Cir. 1933) 20

United States v Moran Towing & Transportation Co., 374 F2d 656 (4th Cir. 1967) 13

United States v One Raft of Timber, 13 F. 796 (S.C. 1882) 14

Victory Carriers v Law, 404 U.S. 202 (1971) 37

Statutes.

1 U.S.C. § 3	28
19 U.S.C. § 1401(a)	28
28 U.S.C. § 1291, et seq.	20
33 U.S.C. § 414, Sect. 19	13
33 U.S.C. § 903	7
46 U.S.C. § 391(a)	32
46 U.S.C. § 740 (62 Stat. 496)	20
46 U.S.C. § 801	28

Treatises.

The Law of Admiralty, Gilmore & Black (1957)	24, 25, 30
Moore's Federal Practice, Vol. 7A (2nd Ed. 1972) paragraph .215(2) et seq.	28
Wigmore on Evidence, 3rd Ed., Vol .II. Sec. 459, 460	40

Rules.

United States Supreme Court Rule 19	11, 42, 43

Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 73-86.

DONALD E. POWERS,
PLAINTIFF, PETITIONER,
v.
BETHLEHEM STEEL CORPORATION,
DEFENDANT, RESPONDENT,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, RESPONDENT,
AND
DONALD E. POWERS,
PLAINTIFF, PETITIONER,
v.
McKIE LIGHTER CO., INC.,
DEFENDANT, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

On October 6, 1967, shortly before daybreak, four men, including the plaintiff, all of whom were experienced pile drivers, were getting ready to start their day's work at

Pier 3, Bethlehem Steel Shipyard in East Boston, Massachusetts. (R.A. 253) The plaintiff testified at trial that he classified himself as a pile driver and secured his work from the Pile Drivers and Dock Builders Union.

> "Q The work that you did was classified as a pile driver, is that correct?
>
> "A I classify myself as a pile driver, yes, sir.
>
> "Q You got your work from the pile drivers and dock builders union?
>
> "A Yes, sir." (R.A. 98)

In each of the three counts of his complaint against McKie Lighter Co., Inc., the plaintiff had alleged:

> "On or about October 6, 1967 the plaintiff was . . . a seaman and member of the crew of a lighter."

But his testimony given at trial was:

> "Q Mr. Powers, you were working at Pier 3 on October 6, 1967, is that correct?
>
> "A Yes, sir.
>
> "Q Is it correct to say that at the Pier 3 job, you had no lighter?
>
> "A No, sir, we did not.
>
> "Q You had been working at the Pier 3 job from approximately August through October?
>
> "A Of 1967, yes." (R.A. 92)

Accordingly, the plaintiff testified that there was no lighter and he negated the allegation in the complaint. Before the Pier 3 job started in August, 1967, two months before his injury, he had been working as a pile driver in Harvard Square. (R.A. 93) Before that, he had worked on the construction of the Cambridge Courthouse, the Mer-

chants National Bank Building and the Boston City Hospital. (R.A. 99, 100)

The contract for which the plaintiff was employed described the work to be performed in the following terms:

> ". . . (McKie Lighter) shall provide for but not limited to the installation of concrete jackets on 53 concrete piles . . . consisting of wire brushing of all existing resteel and concrete surfaces coming in contact with the new work, the furnishing and installation of removable steel and concrete forms, the furnishing and placing of all reinforcing steel and concrete, the furnishing and installation of all expansion bolts, wire mesh and other accessories . . . necessary to complete the work. . ."

During his trial testimony, the plaintiff described his work as follows:

> "Q The work you were doing on the piling was cleaning the outside of the piling and then you had to put forms around them, steel forms, you put reinforcing rods inside the steel?
>
> "A That is correct.
>
> "Q And poured concrete inside the forms. Is that correct?
>
> "A Yes, sir.
>
> "Q In order to do that, the pouring of the concrete, you got it by trucks on the top of the pier. It came down by hoses and went inside the forms.
>
> "A That is correct." (R.A. 95)

Two men would normally stand on top of the pier handling the hoses and two men would stand on a narrow float tied under the pier pouring the concrete around the pilings. The pilings under the pier were in rows. The pier

itself was some 30 to 40 feet wide. (R.A. 95, 96) The space between each row of pilings under the pier was called a bay. (R.A. 97)

The work on the piles under the pier was accomplished by standing on a narrow floating stage or raft tied under the pier. The one in use at the time of the plaintiff's injury was 4 feet wide, some 25 feet long, and composed of four timbers secured together. (R.A. 30, 304, 305) The plaintiff testified that it,

> ". . . was 3 1/2 to 4 feet wide. This was on 10 x 10, 12 x 12 timbers bonded together."

The co-worker nearest the plaintiff, called by the plaintiff as a witness, testified at R.A. 305:

> "Q Three or four feet wide?
> "A Yes, that is right."

The lines from the pier were tied to the raft at all times. (R.A. 99) The plaintiff testified (R.A. 99) concerning the lines between the pier and the raft:

> "Q It was either tied to the raft or tied to the pier at all times?
> "A It was tied to the raft at all times."

The floating stage was used as a work surface by the men under the pier repairing the pilings according to the plaintiff's testimony in deposition, at trial (R.A. 97, 98):

> "I call your attention to your deposition, particularly the bottom of page 16:
>
> 'Q Were you attempting to move the raft along, parallel to the face of the pier?'
>
> "You answered:

'A Well, they were alongside the pier when we started work. And then the foreman would designate a bay he wanted to work in and then we would move them alongside and then nose them into the bay.'

"Q 'Q You mean pull them alongside that way and then turn them in that way?

"A Pulled it by lines, yes.

"Q 'Q And then these rafts were just work surfaces?

'A Wooden rafts, right.

'Q But, I mean, they were used as your work surface so you could work on the piles?'

"You answered: 'Yes'.

"That is true, isn't it?

"A That is right sir."

The distance that the raft would be moved to start work on the piles under the pier would be some 10 to 20 feet. (R.A. 98) Thus at R.A. 98 the plaintiff testified:

"Q And that distance you would move them would be anywhere from 10, 15, 20 feet?

"A It would vary depending upon where the foreman would designate an area where you had to work."

On the particular morning the distance the raft was to be moved was described by the plaintiff as 15 or 20 feet. Thus at R.A. 96 the plaintiff testified:

"Q What was the distance the raft was going to move on the morning of October 6?

"A It would be pretty hard to say.

"Q Would you say about 15, 20 feet?

"A It could be in that area, yes, sir, on that particular morning."

On the morning of October 6, 1967 the pile drivers placed a pair of lights on the side of the pier with bulbs at several foot intervals. (R.A. 309, 310) While the plaintiff was standing on the four-foot wide work float tied to the pier, the light up on the pier which was nearest him and some 10 to 12 feet over his head, suddenly "popped" and a particle of the bulb caused his eye injury. (R.A. 114) There was no evidence that anything struck the bulb, or concerning any impact from any source, and no witness knew why the bulb had broken. (R.A. 45, 114, 286, 287, 307, 257, 258) The men were provided with three types of eye shields: hoods to wear during standblasting, dark eye shields to wear during welding or burning, and clear glass eye shields to wear at any time including chipping work. The decision when to wear the goggles was an individual one. (R.A. 121, 122) The plaintiff testified he saw no reason to wear goggles at the time of his injury (R.A. 122), but he had them with him at that time. (R.A. 122, 154).

> "Q You did have goggles with you when working over there?
>
> "A Yes, sir.
>
> "Q You did not use them when working on the morning of October 6, 1967?
>
> "A There was complete darkness, no need of goggles at that particular time.
>
> "Q There was a light on, the light you have been talking about.
>
> "A There was a light on, yes, sir." (R.A. 122)

On December 29, 1969, three months after he had started the present suit in which he alleged he was,

> "a seaman and member of the crew of a lighter",

(and in which his testimony at trial confirmed there was no lighter, R.A. 92) the plaintiff testified under oath on the witness stand at a formal Compensation Hearing, in the presence of his counsel, that he was a pile driver.

"Q Did you tell the Compensation Commissioner you were always classified as a pile driver?

"A Yes, sir, I did.

"Q You did that on December 29 in order to receive compensation as a harbor worker.

"A Yes." (R.A. 105)

The plaintiff also received and accepted the benefits of the Compensation Statute. (R.A. 105) Section 903 of that Statute (Title 33 U.S.C.) excludes,

"a member of the crew of any vessel"

from its benefits. Section 905 makes it the employee's exclusive remedy against his employer.

Questions Presented.

1. Whether the District Court and Court of Appeals correctly ruled that a work float consisting of four one-foot timbers used as a work surface by a pile driver while pouring concrete around the old piles under a pier to repair them, being at all times tied to the pier, was not a vessel and was not used in "traditional maritime activities, involving navigation or commerce on navigable waters."[1]

2. Whether the District Court and Court of Appeals correctly ruled that a self-styled "pile driver", a member of the Pile Drivers Union, whose work was to install steel forms under a repair yard pier and pour concrete into those forms by a hose from a delivery truck on the pier,

[1] *Executive Jet Aviation, Inc.* v *City of Cleveland,* 409 U.S. 249, 256 (1972)

while standing on a narrow work float, four feet wide, always tied to the pier, does not have a nexus with "traditional maritime activities, involving navigation or commerce on navigable waters"[2] and was not a member of the crew of a vessel.

Summary of Argument.

The decision of the Court of Appeals for the First Circuit is completely in accord with, and expressly follows the very recent opinion of this Honorable Court in the *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249, (1972). That decision was issued several weeks before the oral argument in the case at bar; it was considered by the parties and the Court of Appeals on oral argument and expressly followed by the Court of Appeals in its Opinion. The standards required for admiralty jurisdiction and other legal principles applicable to the case at bar were fully described by this Honorable Court in the *Executive Jet Aviation* opinion. The decision of the Court of Appeals cites and follows that opinion and is not in any respect in conflict with that opinion. The decision of the Court of Appeals is also in complete accord with the opinions of other Courts of Appeal and with other District Courts including all cases cited in the Petition.

In the 1972 opinion in *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249, the Supreme Court noted that with respect to admiralty jurisdiction a mechanical or locus standard has been "actively criticized" and recognized as the more appropriate basis,

> "... traditional maritime activities, involving navigation or commerce on navigable waters." (At page 256)

[2] *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249, 256 (1972)

In the case at bar there has been no navigation or commerce on navigable waters. The plaintiff by his own testimony and by his own witnesses classified himself as a pile driver, obtained all his work from the Pile Drivers Union and before starting on the job for the defendant, McKie, a few months earlier, had been engaged as a pile driver in the construction of a bank, a courthouse, and a hospital, all inside the City of Boston. The work he was performing at the time of his injury was to repair old piles under a pier by pouring concrete into steel forms around the old piles by a hose which was attached to a cement delivery truck on top of the pier. To perform the repairs of the old piles he stood on a narrow work float four feet wide, made of four one-foot timbers secured together, and some 25 feet long. He testified it was at all times tied to the pier. It was moved only to reach the pile to be repaired on the particular day or approximately 10 to 20 feet each morning. It was entirely localized work under the pier repairing the piles and in no sense concerned,

> "... traditional maritime activities, involving navigation or commerce on navigable waters." (Page 256, *Executive Jet Aviation, Inc.* v *City of Cleveland,* 409 U.S. 249 (1972).)

Each case cited in the Petition has been analyzed in detail in the Respondents' Brief and the absence of any materiality has been shown from the facts of each case. For purposes of illustration in this summary, reference is made to two cases, each of which was cited three times in the Petition. In *Grimes* v *Raymond Concrete Pile Co.,* 356 U.S. 252 (1958), cited at pages 10, 14 and 17 of the Petition, the plaintiff was working 110 miles out in the ocean and was transferring from a tug, on which he ate and slept, in a breeches buoy in heavy weather to a so-called Texas

tower when the rough seas threw him against the pilot house of the tugboat causing his injury. Yet the Petition says on page 10 that Grimes was a person

"performing the same work as the plaintiff",

and on page 17 the Petition refers to the *Grimes* case as,

"similar evidence."

The present plaintiff was a pile driver who stood on a float four feet wide made of timbers tied together underneath a pier so that he might pour concrete, from a delivery truck up on top of the pier, into steel forms around the old piles while the float was at all times tied to the pier and once a day moved 10 or 20 feet.

The Petition cites on three occasions the case of *Stanley* v *Guy Scroggins Construction Co.*, 297 F2d 374 (5th Cir. 1961), at pages 9, 14 and 17. Stanley was working 40 miles out in the Gulf of Mexico and was transferring from a tug to an oil drilling tower in rough weather when the roll of the vessel in the heavy seas caused his injury while he was attempting to leave the tug. Yet at page 9, the Petition contends that the *Stanley* case is one of

"similar facts",

to that of the present plaintiff who was a self-styled pile driver pouring concrete into forms around old piles underneath a pier on a narrow work float four feet wide which was always tied to the pier and was merely used to stand on in order to perform the work of repairing the old piles.

The decision below additionally parallels the following language in the case of *Evansville & Bowling Green Packet Co* v *Chero Cola Bottling Co.*, 271 U.S. 19 (1926), in which the Supreme Court rejected any admiralty jurisdiction or status of a vessel for a wharf float saying at page 21:

> "It had no machinery or power for propulsion and was not subject to government inspection as are vessels operated on navigable waters. . . The wharf boat was used to transfer freight between steamboats and land and from one steamboat to another. . . Charges made for services performed by its use were for storage and handling and not for transportation. . . It was not practically capable of being used as a means of transportation. . . It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed."

A factual analysis of all of the cases cited in the Petition confirms that the decision of the Court of Appeals in the case at bar is entirely in accord with all of the cases cited by the Petitioner and is in accord as well with the recent and controlling decision of this Honorable Court in the case of *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249 (1972).

Because none of the considerations required by Rule 19 of the United States Supreme Court are supported by the Petition in the case at bar, the Respondents respectfully submit that the Petition should be denied.

Argument.

I. No Conflict Exists with the Decision of another Court of Appeals.

No question exists that the raft being used as a work float in the openings (called bays) under the pier to repair the pilings was "3 1/2 to 4 feet wide", composed of

"timbers bonded together" with "no deck or surface around it". (R.A. 30)

The witness Ward called by the plaintiff, and who was the pile driver standing beside the plaintiff, testified as follows concerning the width of the raft or work float on which he and the plaintiff were standing:

> "Q The narrow one about three feet wide, is that right?
>
> "A Yes.
>
> "Q Three or four feet wide?
>
> "A Yes, that is right.
>
> "Q So there would be no difficulty in getting this narrow raft in between the pilings into the bay, is that right?
>
> "A No, there never was much difficulty getting either one in between the bays." (R.A. 305)

The plaintiff himself described the raft as follows:

> ". . . it was 3 1/2 to 4 feet wide. This was on 12 x 12, 10 x 10 timbers bonded together. There was no deck or surface around it. . ." (R.A. 30, 304, 305)

No question exists that it was "tied to the pier at all times" and that it moved "10, 15 or 20 feet" depending upon the particular pilings being repaired.

The cases cited by the Petitioner at pages 8 and 9 of the Petition are clearly consistent with the decisions of the District Court and Court of Appeals in the case at bar.

Kenny v *New York*, 108 F2d 958 (2nd Cir. 1940), concerned a "deck scow" named "The Columbiad". It was large enough to have been the subject of a bare boat charter. Further details concerning the deck scow are found in the District Court opinion at 28 F. Supp. 175. The District Court notes that it was moored by anchors in the

tideway and sustained the damage during a storm because she had been improperly anchored. It was large enough to have accommodated several large fireworks display pieces, having in mind the required spacing between such pieces. At page 959 the Circuit Court of Appeals noted it was "capable of navigation at all times".

United States v *Moran Towing & Transportation Co.*, 374 F2d 656 (4th Cir. 1967) concerns a 9400-ton floating drydock which was 360 feet long and 100 feet wide. It was being towed to sea for intentional sinking in the ocean depth when it foundered and sank, blocking the channel. The sole issue before the Court was the applicability of the so-called Wreck Statute under which the United States Corps of Army Engineers were seeking to recover some $163,000 as the cost of removal of the sunken wreck as a menace to navigation in the channel. The Court noted that the explicit language of the Wreck Statute (33 U.S.C. § 414, Sect. 19) applied to any,

> "sunken vessel, boat, watercraft, raft or other similar obstruction."

The significant characteristics therefore were the effect of the sunken object to serve as an underwater obstruction in its sunken condition. It is plainly without materiality to the issues in the case at hand. It may also be noted from the standpoint of statutory construction that Congress saw fit to include the word "raft" as a later word in a sequence which earlier had included the word "vessel". By normal rules of statutory construction the text of that Statute would indicate an intention by Congress to differentiate between a vessel and a raft. The Petitioner, however, purports to cite the case as authority for the opposite conclusion, stating it on page 8 as a case,

> "where rafts were held to be vessels".

There was no raft in the case, but only a sunken wreck of a former drydock. Neither the deck scow in the *Kenny* case nor the 9400-ton sunken drydock in the *Moran* case are material to the case at bar or to the purpose for which they are cited by the Petitioner.

Peck v *U. S. Steel Corp.*, 315 F. Supp. 905 (Minn.), affirmed 446 F2d 891 (8th Cir. 1970), concerned a large derrick barge, named the S2, which was large enough and powerful enough to have lifted a tugboat entirely out of the water. The suit concerned injury to the tug when it was being lifted out of the water by the derrick barge. To cite that case as an illustration of a case "where rafts were held to be vessels" is plainly unsound.

Nor is the case of *Cook* v *Belden Concrete Products, Inc.*, 472 F2d 999 (5th Cir. 1973), an illustration of a case where a "raft-like object was not a vessel." The *Cook* case concerned a former barge transformed into a functioning drydock used for the launching of other newly constructed barges. It relates to a specialized line of cases which have treated the subject of floating drydocks. There is no reference anywhere in the opinion to any "raft-like object" nor is there any dry dock in the case at bar.

II. No Conflict Exists between the Decision of the District Court and the Court of Appeals in the Present Case, and Any District Court Opinion.

Nor is there any merit in the suggestion in the Petition concerning a conflict or indeed confusion at the District Court level. None of the cases cited is material to the present case.

United States v *One Raft of Timber*, 13 F. 796 (S.C. 1882), concerned a raft of lumber for moving a quantity of lumber to market. It was large enough to have been navigated by sail and when anchored without lights in the

navigating channel caused a self-evident hazard to navigation. The issue before the Court was the applicability of a Statute which required navigating lights on coal boats, trading boats, rafts or other water craft. The case does not present any holding that a raft is a vessel since the Statute expressly refers to rafts as part of its sequence. In the particular instance the raft was of such size that it was actually being navigated and presented a navigational hazard to other vessels in the channel when unlighted.

In *Muntz* v *A Raft of Timber*, 15 F. 555 (E.D. La. 1883), the raft was used as a means of transporting an amount of lumber down the Mississippi River and was of such size that when it got away during a storm, it took two large and one small tugboats to manage it. It has no materiality to the pouring of concrete into a form around a piling under a pier from a hose leading from a concrete delivery truck while standing on a narrow work float always tied to the pier. It is of particular interest that the Court in the *Muntz* case made the following comment at page 557:

> "The decision in this case need not be taken as holding that a raft is a vehicle of navigation or can commit a maritime tort or as being subject to any other obligations or responsibilities than a bale of cotton would be subject to under the same circumstances."

In *Seabrook* v *Raft of Railroad Ties*, 40 F. 596 (S.C. 1889), the raft of lumber was 150 feet square and it caused collision damage to a large steam dredge while traveling down the Stone River. The 150-foot raft had first traveled down the Edisto River and then other navigable rivers and then finally to the Stone River where the collision occurred. It was characterized by the Court as a "voyage of many days duration". Further, that

"it was manned with a pilot who was in command, a crew of four men and a cook".

The Court also stated at page 598 that,

"Necessarily it was constructed to withstand the buffeting of the waves and wind . . ."

Charles Barnes Co. v *One Dredge Boat*, 169 F. 895 (E.D. Ky. 1909), concerned the mortgage of a

"pump boat, its machinery, sails, furniture and apparel".

It was described by the libellant as having

"a scow bow, a scow stern, a deck fore and a deck aft, and a cockpit in the center covered by a cargo bow".

The Court noted it was

"capable of being towed to any place in the Ohio River where its services might be needed".

Accordingly, it functioned as a vessel in activity as well as in its characterization in the mortgage.

In the case of *Tregoning Boat Co.* v *United States*, 15 Cust. Ct. 196, C. O. 971 (1945), a case in the Court of Customs, concerned the classification for custom duties of a lifeboat fitted with sails, a rudder, food, water and signalling equipment. It was designed to accommodate 12 persons and save them during a storm at sea. No reasonable relation to the present work stage tied under the pier can be made.

There is no factual and no legal relationship between any of the foregoing cases and the case at hand. Not only is it clear that the plaintiff's work was that of a pile driver pouring concrete around steel forms under a pier, while

standing on a work float 4′ x 1′ x 25′ used only to stand on while it was always tied to the pier, but his work was clearly not that of a seaman as defined in the case of *Carumbo* v *Cape Cod Steamship Company,* 123 F2d 991 (1st Cir. 1941). That definition was quoted and followed by the Supreme Court in *Swanson* v *Marra,* 328 U.S. 1, 5 (1945) and was cited in the Opinion of the District Court in the present case. (R.A. 371) The *Carumbo* decision at page 995 reads as follows:

> "The requirements that the ship be in navigation; that there be more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation appears to us to be the essential and decisive elements of the definition of a 'member of a crew'."

All three of the requirements must be met. Since the plaintiff was working on a floating stage under a pier which was always tied by lines to the pier he fails the first of the three requirements, i.e.,

> "that the ship be in navigation".

The Supreme Court used as its comparable phrase,

> "encounter perils of navigation to which craft used for transportation are exposed",

which appears at page 21 in *Evansville & Bowling Green Packet Co.* v *Chero Cola Bottling Co.,* 271 U.S. 19 (1926).

Secondly, it is clear that he had no

> "more or less permanent connection with the ship",

since his only relationship to the staging was to stand on it while he was repairing the piles. (R.A. 97, 98)

The third requirement, that the seaman be aboard primarily to aid in navigation, is plainly deficient since the plaintiff primarily and indeed exclusively was working on the repair of pilings under the pier.

The phrase,

"primarily to aid in navigation",

has been construed to include the specialized mission of the vessel as a vessel. Thus, although an oiler or wiper in the engine room would not be directly aiding in navigation, he would be plainly a member of the crew since he is aiding in transporting the vessel over the sea. Similarly on a passenger vessel where entertainment of the passengers was part of the mission of the voyage an orchestra player would be included as a member of the crew for such a voyage. But if the only function of a floating stage is to be essentially at rest under a pier, no one can be regarded as on board "primarily" to aid in its navigation since no navigation is intended or performed. The primary and only performance is that of cleaning and repairing piles driven into the ground under a pier only 40 feet wide while standing on a stage float permanently tied to that pier.

Evansville & Bowling Green Packet Co. v *Chero Cola Bottling Co.*, 271 U.S. 19 (1926)
Thibodeaux v *J. Ray McDermott & Co.*, (5th Cir. 1960) 276 F2d 42.

Nor does any relationship or any conflict exist between the following District Court cases cited by the Petition at page 8 and the case at bar:

Raft of Cypress Logs, Fed. Cas. No. 11,527 (W.D. Tenn. 1882), concerned the navigation of a large commercial raft of cypress logs on a voyage of several hundred miles from New Madrid, Missouri to Memphis, Tennessee to reach the

lumber markets. The case concerned the wages of the sailing crew during that lengthy voyage and is plainly a non-material situation to the present case.

Moores v *Louisville Underwriters,* 14 F. 226 (W.D. Tenn. 1882), concerned the interpretation of a cargo insurance policy applied to a lumber raft towed astern of a Mississippi steamboat for purposes of transporting the lumber to the lumber market. It was large enough to have a barge towed astern of it. It is patently extraneous to the present case both in its factual circumstances and its legal issues.

Berton v *Tietjen & Lang Dry Dock Co.,* 219 F. 763 (N.J. 1915), concerned a floating dry dock and its characterization at the bottom of page 8 of the Petition as a "raft-like object" is wholly unsound. The case follows a long line of specialized cases relating to floating dry docks which held them not to be vessels. There is no suggestion anywhere that a floating dry dock was in any manner concerned in the present case.

The references at the top of page 9 of the Petition to

> "other appellate decisions . . . under similar facts"

is not supported by the cases which follow since none of them has facts which are in any respect similar to the case at bar.

In *Stafford* v *Perini Corporation,* 475 F2d 507 (1st Cir. 1973), the plaintiff was injured while working on the deck of a large ocean going scow two miles at sea in the waters of Narragansett Bay.

In *Biggs* v *Norfolk Dredging Company,* 360 F2d 360 (4th Cir. 1965), the plaintiff was characterized by the Court in the following language at page 362:

> "Biggs, who held a Coast Guard certificate as a seaman, had on occasion handled the lines and assisted in maneuvering the barges."

Moreover, at the time of his injury, Biggs was standing on a derrick barge and had just stepped onto the derrick barge from a pontoon barge. There were several other barges there which the plaintiff also maneuvered. There is no suggestion anywhere in the present record that the present plaintiff had any certificates as a seaman, nor was there either any derrick barge, nor was there any barge of any kind in use at the Pier 3 job where he was employed at the time of his injury.

In *Stanley* v *Guy Scroggins Construction Co.*, 297 F2d 375 (5th Cir. 1961), cited by the Petitioner at page 14 of the Petition, the plaintiff was some 40 miles out in the Gulf of Mexico and was swinging from a tug to board a drilling tower. The plaintiff ate, slept and bathed on a tugboat which serviced the tower and worked on the tower itself. The maritime quality of his work is evidenced by the fact that the roughness of the sea was the immediate cause of his injury. At page 376 the Court states:

> "Just as Stanley was about to swing, a large wave lifted the boat up. Stanley was thrown off balance. He swung out, clutching the rope, and banged into a steel ladder on the platform."

The case is clearly no material or reasonable precedent for a pile driver repairing fixed piles underneath a 40-foot pier, on a narrow float staging tied at all times to or under that pier.

In *United States* v *Bruce Dry Dock Co.*, 65 F2d 938 (5th Cir. 1933) and *The Bart Tully*, 251 F. 856 (6th Cir. 1918), the Courts were confronted with the procedural problems which have since been cured by the enactment first of the Federal Tort Claims Act, 28 U.S.C. § 1291, et seq., and second by the Extension of Admiralty Jurisdiction Statute, 62 Stat. 496, 46 U.S.C. § 740. In each case a collision had

occurred between a vessel and a land unit under circumstances which would have afforded admiralty jurisdiction to the vessel but not to the owner of the dry dock in one instance, or to the wharf in the other. Since both cases would lie within the statutory extension of admiralty jurisdiction, the cases are without current authoritative application except to point to the reasonableness of the Statutes which have now been enacted to meet the exigencies suggested by the cases cited.

None of the cases cited by the Petitioner as grounds for consideration for review on certiorari is material to the case at bar, nor do they present any conflict with the case at bar. They do not reasonably support the granting of certiorari by this Honorable Court.

III. No Important Question of Federal Law is Presented by the Present Case.

With so recent and searching a review by the Supreme Court concerning the standards of admiralty jurisdiction as *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249 (1972), it is especially clear that no further review in that identical field warrants the exercise of this Court's discretion in granting certiorari. A significant summary of the law applicable to the case at bar with respect to maritime jurisdiction appears at page 261 of that decision in the following text:

> "In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."

This opinion was expressly followed by the Court of Appeals in the case at bar. Whether the local nature of the plaintiff's work pouring concrete around fixed piles under a pier from a delivery truck overhead is the controlling standard, or whether the essentially stationary narrow work float, always tied to or under the pier as a working surface to perform that fixed local work, is the standard, there is a complete absence of any

> "maritime nexus—some relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters." Page 256, *Executive Jet Aviation* v *City of Cleveland,* 409 U.S. 249.

Here, the plaintiff was working on or under a pier and using a small, crude work float merely to stand on to perform his work as a pile driver. It is a contrived absurdity for the Petition to refer (as it does at page 5 thereof) to

> "navigating" or "transport".

The "transport" and "navigating" was a distance of 10 or 20 feet while always tied to the pier and the positioning was convenience in performing the work of pouring concrete around the old pilings underneath the pier. The propriety of the decision by the Court of Appeals especially guided by the scholarly and thorough direction in the current opinion of this Court in *Executive Jet Aviation, Inc.* v *City of Cleveland,* 409 U.S. 249, wholly refutes any ground for this Court's discretion in granting certiorari in the present case.

In *Hark* v *Antilles Air Boats, Inc.,* 41 U.S.L.W. 2506-07 (V.I. 1973), an injury occurred at a considerable distance off shore in a seaplane which was, as the Court pointed out, used as a mobile vessel. After the plane had moved at high

speed over the water for takeoff and had barely become airborne, the damage occurred. There is plainly no analogy or materiality between the present case and the operation of seaplanes at high speed, either before take off or after take off, for a several hundred mile run between two islands in the Caribbean in the Virgin Islands group.

IV. The Decision does Not Conflict with Any Applicable Decision of the United States Supreme Court.

The Petitioner cites at pages 9 and 10 of the Petition the following three cases as illustrations of a ruling "that a raft similar to the one at bar may be a vessel". An examination of the facts of the cases, however, does not support this contention.

In *Knapp, Stout & Co.* v *McCaffrey,* 177 U.S. 638 (1899), the Supreme Court ruled that a Bill in Equity in the State Court of Illinois was a proper remedy for enforcing a possessory lien against a raft of lumber for towage services from Stillwater, Minnesota to St. Louis, Missouri provided to other rafts of lumber. The Court noted that it was not an action in rem against the raft as a res and therefore not intended to be an admiralty action. The non-admiralty jurisdiction of the Illinois Court was sustained.

New Bedford Dry Dock v *Purdy,* 258 U.S. 96 (1922), concerned a 200-foot long car float which had "steering apparatus and a steam plant of the propeller type for propulsion". It was plainly incorrect for the Petitioner at page 9 to refer to the case as "a raft similar to the one at bar".

The third case, *Nogueira* v *New York, N.H. & H.R.R.,* 281 U.S. 128 (1930), concerned another car float, this time described as being of 500 tons' dimension Not only was its size sufficient for transferring heavy railroad cars across wide areas such as New York harbor, but its freeboard and

decking were also designed for similar maritime commercial transportation. It plainly has no application to the case at bar and it is completely unsound to refer to it as " a raft similar to the one at bar".

Nor is it correct to refer to the plaintiff in the case of *Grimes* v *Raymond Concrete Pile Co.*, 356 U.S. 252 (1958), as

> "performing the same work as the plaintiff performed herein".

The plaintiff Grimes was 110 miles at sea, being transferred in a breeches buoy from a rolling tugboat in heavy weather to a sea based so-called Texas tower when the rolling of the sea caused him to be thrown against part of the structure. It is completely unsound to characterize circumstances of such an injury with the present plaintiff pouring concrete into steel forms underneath the pier from a hose attached to a truck on the surface of the pier while standing on a work float some four feet wide, which was moved 15 or 20 feet each day in accordance with the location of the particular piles being repaired under the pier.

None of the citations presented by the Petition is material to the case at bar and no proper ground for the granting of certiorari has been presented by the Petitioner therefrom.

V. No Case has been Cited in the Petitioner's Argument which is Material to the Case at Bar.

The Petition makes initial reference to the definition used to describe a vessel by Messrs. Gilmore & Black in their text, *The Law of Admiralty*, (1957) at page 30 reading:

> ". . . floating structures capable of transporting something over water."

The authors applied footnote No. 105 on page 30 to that quoted definition citing first the case of *Pleason* v *Gulfport Shipbuilding Corporation*, 221 F2d 621 (5th Cir. 1955). That case is also cited by the Petitioner.

The vessel in the *Pleason* case to which the above phrase was applied was called the "Carol Ann". It was 183 feet long with a 32-foot beam and a 20-foot depth. It was built in 1943 as a salvage vessel for the United States Navy. It was of wood and steel with 1,500 gross tons burden. It had earlier made voyages to Honduras and had crossed the Gulf of Mexico. In the case at bar, a work float was always tied to the pier and merely positioned for the day's work by lines which were always tied to the 40-foot wide pier. The pilings were being cleaned and then re-strengthened by placing an additional thickness of cement around the steel reinforcement. The sole purpose was to provide a work stage for workmen repairing the pilings under the pier. Thus, at page 91 of the transcript when the plaintiff was asked to testify in confirmation of his earlier deposition, the record states:

"Q 'Q You men pull them alongside that way and then turn them in that way?'

"A Pulled it by lines, yes.

"Q 'Q And then these rafts were just work surfaces?

'A Wooden rafts, right.

'Q But, I mean, they were used as your work surfaces so you could work on the piles?'

"You answered: 'Yes.' That is true, isn't it?

"A That is right, sir." (R.A. 97, 98)

Footnote No. 105 at page 30 in *The Law of Admiralty*, after citing the *Pleason* case, then cites two additional cases to illustrate what is *not* a vessel, and one additional case

to illustrate what *is* a vessel. The latter case, illustrating what *is* a vessel, is *Kenny* v *The City of New York* (CA 2 1940) 108 F2d 958. The vessel in that case was a deck scow under bare boat charter at the rate of some $300 a month and named the "Columbiad". Its dimensions are not given but it was used for a public fireworks display and one may reasonably infer a length in excess of 200 feet, having in mind the necessity for open spacing between large fireworks display pieces so that each can be lighted successively.

The two cases cited by Gilmore & Black to illustrate what is *not* a vessel provide strong confirmation of the ruling by the District Court and Court of Appeals in the present case. The cases are *Cope* v *Vallette Dry Dock Co.*, 119 U.S. 625, and *Evansville & Bowling Green Packet Co.* v *Chero Cola Bottling Co.*, 271 U.S. 19 (1926). In the *Bowling Green Packet* case, the United States Supreme Court denied the status of a vessel to a barge 223 feet long, 48 feet wide with a 6-foot depth. It had earlier made trips up and down the Mississippi River. At the time of the incident concerned in the litigation it was tied to a pier as a "wharf boat" and moved only short distances each day to accommodate itself to the currents in the river. At page 21, the Supreme Court cited a number of circumstances negating the status of a vessel stating:

> "It had no machinery or power for propulsion and was not subject to government inspection as are vessels operated on navigable waters. . . The wharf boat was used to transfer freight between steamboats and land and from one steamboat to another. . . Charges made for services performed by its use were for storage and handling and not for transportation . . . It was not practically capable of being used as a means of transportation . . . It performed no function that might not have been performed as well by an appropriate struc-

ture on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed."

The reference by the Supreme Court to "a floating stage or platform permanently attached to the land" coincides perfectly with the work platform tied to the pier in the present case. The plaintiff himself described the line from the pier as,

"It was tied to the raft at all times." (R.A. 99)

If the work boat in the *Bowling Green Packet* case was not "practically capable of being used as a means of transportation" although it was 243 feet long, 48 feet wide and 6 feet deep, then far more impractical would be any means of transportation from these lashed floating timbers held together temporarily by rope. They were clearly suitable for the purpose for which they were being used, namely, as a floating stage for pile drivers working under a 40-foot pier to which it was at all times secured as was the wharf boat.

The second case cited by Gilmore & Black in footnote 105 is *Cope* v *Vallette Dry Dock Co.*, 119 U.S. 625 (1887). In that case the Court ruled that a floating dry dock was not a vessel and gave its reasons in the following detail at page 627:

"They describe the dry dock as a structure contrived for the purpose of taking ships out of the water, in order to repair them, and for no other purpose. They state that it consisted of a large oblong box with a flat bottom and perpendicular sides; that in the year 1866 it had been put in position by being permanently

moored by means of large chains to the right, or Algiers, bank of the Mississippi River, and was sparred off from the bank by means of spars, to keep it afloat. When it was desired to dock a steamboat or other vessel, it was sunk by letting in water until the vessel to be docked could be floated into it. It was then raised by pumping the water out, leaving the docked vessel in a position to be inspected and repaired. It was furnished with engines, but they could only be used for pumping, and the dry dock had no means of propulsion, either by wind, steam, or otherwise. It was not designed for navigation, and could not be practically used therefor."

Whatever the source of the definition, whether the Statutes of the United States as in 1 U.S.C. § 3, 19 U.S.C. § 1401(a), 46 U.S.C. § 801, or in Volume 7A of Professor Moore's treatise on Federal Practice, (2nd Ed. 1972) paragraph .215(2) et seq, the connotation of transportation by water in terms of commerce and navigation is inherent throughout. They are also consistent with the comment of the Supreme Court at page 256 in the case of *Executive Jet Aviation, Inc.* v *City of Cleveland,* 409 U.S. 249 (1972) reading:

> "Other Courts, however, have held in such situations that a maritime locality is not sufficient to bring the tort within Federal admiralty jurisdiction, but that there must also be a maritime nexus—some relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters."

In addition to citing the cases already considered, the Petitioner at page 11 also cites the following cases whose

s make it clear that they are without any materiality to case at bar.

n *Offshore Company* v *Robinson,* 266 F2d 769 (5th Cir. 9), the plaintiff was a regular member of the drilling w serving on a barge 200 feet long, 104 feet wide, and feet deep used as a mobile drilling platform in the Gulf Mexico. At page 772 the Court stated:

"It has no engines and is moved by tugs from one well located in the Gulf to another. It has living quarters for the crew and a galley in a two-story house on top of the deck. Six life rafts are carried, each capable of holding 10 men. Regular abandon ship drills were held aboard Offshore No. 55. Its life-saving gear was approved by the Coast Guard."

he case is entirely different from that of the present intiff whose work as a pile driver was under a pier on a k float as a platform to pour concrete into steel forms m a hose leading from a truck up on the pier.

n *Colby* v *Todd Packing Co.,* 77 F. Supp. 956 (Alaska 8), the Court pointed out that salvage could properly against either a vessel or its cargo or any object at sea h value. It quoted at page 958, from an earlier case of *ltby* v *Steam Derrick Boat,* 16 Fed. Cases, 564, which ed in part:

"It has long been held that property, whether it has been an actual instrument or subject of commerce or not, may be the subject of salvage."

n short, there are many instances where bales of wool ther items of cargo have been the subject of salvage. re is no holding whatever in the case that the fish trap ribs of logs were in any sense a vessel. In accord with

that view is the comment in Messrs. Gilmore & Black's text, *The Law of Admiralty,* at the end of footnote 105 on page 30 concerning the salvable qualities of an airplane where the authors point out that salvage is not dependent upon the status as a vessel, by saying:

> "In any case a decision that an airplane may be the subject of salvage need not imply that it is a 'vessel'."

In *Spiller* v *Thomas M. Lowe, Jr. & Associates, Inc.*, 328 F. Supp. 54 (Ark. 1971), the vessel was one of a fleet of six 16-foot boats being used by a mapping and survey party to travel a 206-mile segment of the Red River, that is, from mile 230 to mile 436 of that river. At page 57, the Court comments as follows:

> "The manufacturer's rating for the boat in question was as follows: This boat is built to accommodate under normal conditions an outboard motor of not more than 35 OBC certified horsepower and five persons at 150 pounds per person or a properly located maximum weight of 1,080 pounds for persons, motor and gear."

In *Guilbeau* v *Falcon Seaboard Drilling Co.*, 215 F. Supp. 909 (La. 1963), the vessel was 260 feet long and 52 feet wide fitted with sleeping quarters and a galley for the crew. It was moved from various places in inland waters by tugboat and at the time of the injury had been towed to a location in a navigable river.

None of the foregoing cases is material or comparable to the case at bar, of a work platform four feet wide, which was always tied to a pier and used for standing to pour concrete into forms around fixed pilings under a pier. The Petition next cites at page 12 two cases which effectively illustrate the caliber of transportation contemplated by the

definition. Thus in *The General Cass,* Fed. Cas. No. 5307, P. 170 (E.D. Mich. 1871), the Court considered a lumber scow used for carrying loads of lumber across the shoals in the Saginaw River over which the larger vessels were unable to pass safely. In describing the commerce in which the lumber scow was engaged, the Court stated at page 170:

> "The lumber of the Saginaw valley, as an article of commerce, passing down and out of the Saginaw river, on its way to the lumber marts of other states and countries, constitutes one of the greatest interests of its kind in the world, and in its transportation employs vessels of all sizes, forms and capacities, and all kinds of propelling power, from the insignificant scow, like the one here in question, to the largest sized vessels and steamers that float the lakes. The business and employment of each, irrespective of the accidents of size, form, capacity or propelling power, appertains equally to trade and commerce, and all therefore equally subject to the jurisdiction of this court."

The static function of the present plaintiff standing on a four foot work float, always tied to or under the pier, in order to repair the pilings under the pier, is completely opposite to the commerce described in the foregoing case. The work float was kept on the outside of the pier after hours and moved into the bays under it to work on the piles, a distance of some 10 to 20 feet, and yet the Petitioner at page 12 characterizes this action as "repeatedly used to transport men and equipment over navigable waters".

In *The Pioneer,* 30 F. 206 (E.D. N.Y. 1886), a dredge, large enough to carry a steam-operated shovel and bucket for digging navigable channels, was concerned. It is in no sense a precedent for a three and one-half to four foot work

float which was always tied to or under the pier in order that pile drivers might pour concrete into forms around the piles underneath the pier and which they moved every morning some 10 to 20 feet to start their work.

Although the Petitioner purports to suggest that the vessel in *Brinegar* v *Iron Ore Construction Company*, 302 F. Supp. 630 (E.D. Ark. 1969), was a makeshift pontoon oil carrier, the facts in the case indicate that the vessel was capable of carrying a thousand gallons of fuel and it also had sufficient power to tow a large dredge, and also to tow several barges on the Arkansas River. Further, because of her ability to transport a thousand gallons, she was subject to the provisions of Title 46, U.S.C. § 391(a), which required that she be in command of a licensed master, and her manning requirements required the approval and inspection of the United States Coast Guard. The case is completely without materiality to the present instance of a four-foot work float tied underneath the pier in order that pile drivers could stand on it to pour concrete around the piles under the pier.

Finally, the Petitioner refers to the case of *Braniff* v *Jackson Ave.-Gretna Ferry, Inc.*, 280 F2d 523, (5th Cir. 1960). A printing error in the Petition refers to "Gretna Terry, Inc." instead of the correct name, "Gretna Ferry, Inc.". As that key word "Ferry" indicates, the case concerns a large ferry boat traveling down the Mississippi River, and while so traveling a work tender was put over the side, attached to the ferry and traveling with it, in order to make some mechanical repairs while underway. The tender capsized while being handled by the crewmembers of the ferry. The case has no relation to the facts of the present case in which the plaintiff was performing a stationary land-based task of pouring concrete around piles under a pier while standing on a four-foot work float which was always tied to the pier, and which moved some 10 to

20 feet solely for the purpose of positioning it beside the particular pile to be worked on. In sum, none of the cases cited in the Petition in Section 1 of its Argument is material to the case at bar, and the decisions of the Court of Appeals and of the District Court are in no sense in conflict with any decision either of the United States Supreme Court, or of any Court of Appeals, or of any District Court.

VI. No Conflict Exists Concerning the Applicable Law between the Decisions Below and Any Established Precedents.

(a) The contention in the Petition that the work float was not an extension of the land is without materiality. It is material rather that the float was always tied to the pier, that from its narrow width and simple construction of four lashed timbers, it was completely unsuitable to navigation or ocean transportation, and suitable only for its actual use for standing while doing the pile driving work around the old piles under the pier. In each of the cases cited by the Petitioner at pages 13 and 14, the maritime activities were plain from the distance at sea at which the activities were occurring and by the nature of the activities. Thus in the case of *Spratley* v *Tidewater Construction Corporation*, 238 F. Supp. 650 (E.D. Va. 1965), the plaintiff was regularly employed on a barge which was traversing the open waters of Chesapeake Bay across a distance of some 20 miles. The vessel on which he was injured was described by the Court at page 650 as,

> "A barge of approximately 50 by 128 feet on which was mounted a derrick or crane.

A cogent indication of the maritime quality of the plaintiff's duties is found in the fact that at the time of his in-

juries the waters in which the vessel was then operating were so rough that the circumstances of his injury were described as follows on page 651:

> "Just as Spratley began to step down the roughness of the sea caused the barge and its crane to jerk the scaffold suddenly into the air whereupon Spratley lost his balance and fell . . ."

The plaintiff plainly encountered,

> "perils of navigation to which crafts used for transportation are exposed".

Evansville & Bowling Green Packet Co. v *Chero Cola Bottling Co.*, 271 U.S. 19 (1926), 21.

In *Biggs* v *Norfolk Dredging Company*, 360 F2d 360, (4h Cir. 1965), the plaintiff not only

> "held a Coast Guard certificate as a seaman",

but there were

> "several barges ranged along the shipyard's dock",

together with a larger

> "derrick barge",

which the plaintiff was on board performing his work including the maneuvering of the various barges.

In the two remaining cases cited at page 14, the plaintiff in *Stanley* v *Guy Scroggins Construction Co.*, 297 F2d 374 (5th Cir. 1961), was working 40 miles out in the Gulf of Mexico and his injuries were caused "when a large wave threw him against an offshore oil drilling platform."

The plaintiff in *Stafford* v *Perini Corporatoin*, 475 F2d 507 (1st Cir. 1973) was on the deck of a large ocean going

scow working when it was some two miles from shore in the waters of Narragansett Bay.

In *Grimes* v *Raymond Concrete Pile Co.*, 356 U.S. 252 (1958), the plaintiff was 110 miles at sea attempting to transfer in a breeches buoy in rough weather from a rolling tugboat to a so-called Texas tower when the rough seas caused his injury.

The maritime activities of all of these plaintiffs in the cited cases are plainly apparent, but the activities of the plaintiff in the case at bar were those of a pile driver working under a pier pouring concrete around old pilings while he stood on a work float which served merely as a platform to perform that pile driving work. It was at all times tied to the pier, and was some four feet wide. There would plainly be no impact upon the uniformity of maritime law by the allocation of such a localized function to the local law of the land. It would be completely in accord with the views of the Supreme Court stated in the *Evansville & Bowling Green Packet Co.* v *Chero Cola Bottling Co.*, 271 U.S. 10 (1926) at page 22:

> "It was not practically capable of being used as a means of transportation. . . It performed no function that might not have been performed as well by an appropriate structure on the land or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed."

(b) The contention on page 15 of the Petition that admiralty jurisdiction in non-aviation cases "depends solely on the situs of the injury" is not well founded, and is plainly in conflict with the current views of the Supreme Court in *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249 (1972) at page 261, reading as follows:

> "In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."

The significant phrase, "traditional maritime activities", was defined more fully earlier in the decision at pages 255 and 256 where the Court refers to,

> ". . . traditional maritime activities involving navigation or commerce on navigable waters."

and

> ". . . traditional forms of maritime commerce and navigation."

At page 256, footnote 6, the Supreme Court refers to the case of *McGuire* v *City of New York,* 192 F. Supp. 866, (S.D. N.Y. 1961). That Opinion of the District Court contains a scholarly review of the authorities which in turn also support the language of the United States Supreme Court which we have quoted. At page 871 of the *McGuire* case the Court therein states:

> "The touchstone has been whether the action, tort for example, was not merely one of local concern but was in fact a thing having an intimate relation with navigation and interstate and foreign commerce."

Further, on page 871, the *McGuire* case also contains the following comment:

"That the locality test was and continues to be a rule of exclusion or limitation is recognized by the Supreme Court."

The phrase, "rule of exclusion or limitation", indicates in effect that without the locality test, no jurisdiction exists, but with it no jurisdiction exists unless there is also,

"... traditional maritime activities, involving navigation or commerce on navigable waters." *Executive Jet Aviation, Inc.* v *City of Cleveland,* 409 U.S. 249 (1972) at page 256.

Thus, in *Victory Carriers* v *Law,* 404 U.S. 202 (1971), the land-based injury was clearly non-maritime and was excluded from maritime jurisdiction. In contrast, *Gutierrez* v *Waterman Steamship Corporation,* 10 L. Ed. 297 2d (1963), a land-based injury was included because it was caused by a maritime activity, namely the condition of the cargo carried to Ponce, Puerto Rico on the SS Hastings, then being discharged.

Victory Carriers v *Law,* 404 U.S. 202 (1971)
Gutierrez v *Waterman Steamship Corporation,* 10 L.Ed. 2d 297

In *Grant Smith-Porter Ship Co.* v *Rohde,* 257 U.S. 469 (1922), an uncompleted newly-constructed vessel was ruled to be therefore still a land-based activity and the traditional rule that a new vessel while still under construction is a non-maritime activity was followed.

The case of *Nacirema Operating Co., Inc.* v *Johnson,* 396 U.S. 212 (1969), reh. denied 397 U.S. 929 (1970), concerned a land-based injury and the ruling of the Court was equally consistent but turned more specifically on the language of the Federal Compensation Statute which was interpreted to exclude land-based activities.

In *Atlantic Transport Co.* v *Imbrovek*, 234 U.S. 52 (1913), The Supreme Court alluded to the maritime activity requirement and noted that it was in any event clearly satisfied since the plaintiff was working on a large packet steamship stowing its cargo for the international run between Hamburg, Germany and New York. The Petitioner at page 15 strangely cites the *Imbrovek* case for the contention that "the presence of a vessel is not required", although the packet steamer Pretoria, on which the plaintiff was stowing the cargo, was engaged in the Hamburg-America steamship run. The Petition on the same page 15 cites the cases of *McWilliams Dredging Co.* v *United States*, 105 F. Supp. 582 (E.D. La. 1952), and *The Hezekiam Baldwin*, 8 Ben. 556, 12 Fed. Cas. No. 6449, for the contention that no vessel is required. Yet in the *McWilliams* case the discharge line of a hydraulic dredge which extended completely across the harbor channel was struck by a departing ocean cargo vessel, and the scow in *The Hezekiam Baldwin* was large enough to carry grain-loading equipment throughout the harbor to cargo ships to load and unload their grain cargoes. The dredge and discharge line in the *McWilliams* case which so blocked the channel that the departing steamer struck it in mid-channel were clearly related to the traditional maritime activity of navigation in the same channel. The scow in *The Hezekiam Baldwin* was itself a vessel which moved about the harbor to the various places where it might be required for the purpose of transferring grain from one vessel to another. It not only carried grain cargoes across the harbor,

> "from one vessel to another",

but was itself,

> "subject to the same vicissitudes and perils of the seas to which all vessels are exposed". (page 15)

The Robert W. Parsons, 181 U.S. 17 (1903), concerned a large canal boat which carried cargo between Lake Erie and New York Harbor, and then travelled across the Harbor or the Lake to its destination.

Each of these cases readily meet the jurisdictional standards currently set forth in *Executive Jet Aviation* v *City of Cleveland,* 409 U.S. 249 (1972), at page 256, of

> "... traditional maritime activities involving navigation or commerce on navigable waters".

The total absence of these requirements in the case at bar in which a self-styled pile driver was pouring concrete into forms under a pier while standing on a float, four feet wide, always tied to the pier is plain, and the rulings of the District Court and the Court of Appeals were proper.

(c) After citing a number of cases previously cited in the Petition, the Petitioner at page 18 cites the case of *Hess* v *United States,* 361 U.S. 314 (1960). In that case, the plaintiff was working on board a tug and barge in the Columbia River when the tug and barge struck a pier, causing the tug and barge to founder and capsize in the turbulent waters from the spillway of the dam. The flotilla was operating in a navigable river and was clearly engaged in a maritime activity. Indeed, the Court of Appeals Opinion, 259 F2d 285 (9th Cir. 1958), in its comment at footnote 4, at page 289, states:

> "But here it cannot be doubted that the activities in which the decedent was engaged had a direct relation to navigation and commerce."

The decisions in the Courts below are therefore wholly in accord with all applicable precedents and preserve the uniformity reflected in those precedents.

Petitioner also seeks to rely upon the testimony of so-called experts to which reference is made at page 17 of the Petition. The testimony of the proposed expert, Willard Appley, was not material to the issues and was properly excluded by the Trial Court. In describing his experience with vessels, Mr. Appley referred to the operation of a tugboat, and towage of deck scows, lighters and barges. In his cross-examination under voir dire (R.A. 332) he admitted that the barges were from 175 to 225 feet by about 40 feet beam. There was no lighter, scow, tug, or barge in use at any time during the performance of the job at Pier 3 from the commencement of that job in August, 1967, until the date of the plaintiff's injury in October, 1967. The proffered testimony by Willard Appley was properly excluded by the Court and the Court reasonably exercised its sound discretion thereby.

> "It is a well established rule of evidence that circumstances under which other comparable conduct occurs should be substantially similar. Wigmore on Evidence, 3rd Ed., Vol. II, Sec. 459, 460; Chesapeake & O. Ry. Co. v. Thomason, 6 Cir., 70 F.2d 860; People v. Gotshall, 123 Mich. 474, 479, 82 N.W. 274; Trask v. Boston & Maine R.R., 219 Mass. 410, 415, 106 N.E. 1022."
>
> *Detroit, T & I R Co.* v *Banning,* 173 F2d 752, 756

The other purported expert, Ward, was a co-worker of the plaintiff who was standing near him. He did not purport to contradict the plaintiff's own testimony that the raft was some three and one-half to four feet wide, and his testimony to that effect (R.A. 304, 305) is quoted herein at page 4. Nor did he purport to contradict the plaintiff's

own testimony that the raft was tied to the pier at all times and was merely used under the pier to repair the piles. Any reference in the petition to movement of the raft,

> "over navigable waters",

necessarily is prescribed by the specific testimony that the movement would be some 10, 15 or 20 feet depending upon the location of the piles to be worked on that morning as laid out by the foreman of the job. Plainly, these specifics are consistent with the local quality of the work being performed, and are inconsistent with,

> "... traditional maritime activites, involving navigation and commerce."
>
> *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249, page 256

It is of some interest that the section of the Petition commencing on page 13 and ending on page 20 is the verbatim text of the Petitioner's earlier Motion for Rehearing already filed and already ruled on by the Court of Appeals. The two "hypothetical" situations on page 19 have already been evaluated by the Court of Appeals as reaching,

> "distorted results not dictated by anything said or implied in our opinion."

The assumptions contained in each hypothetical are completely unrelated to the actual facts of the case. In the first, if the seaman were a crewmember of a vessel arriving at a harbor, that status would be obviously a basis for his action and there is nothing in the Opinion of April 8, 1973 which would contravene it. The second hypothetical is so abstruse as to be unclear in its presentation. Moreover, there are numerous assumptions which are not only un-

supported by, but in conflict with, the facts presented by the present plaintiff. There is nothing in either hypothetical which is material to or affected by the Opinion of the Court of Appeals of April 9, 1973.

VII. No Ground for the Considerations Cited by Rule 19 is Presented.

The issues in the present case have been thoroughly considered in a complete Opinion of the District Court, and in two further adjudications by the Court of Appeals for the First Circuit in the initial Appeal and in the Motion for Rehearing. But, in addition the plaintiff also has testified in a formal Hearing before the Bureau of Employee's Compensation, as a result of which he secured an adjudication by the Deputy Commissioner that he was within the coverage of the Longshoremen's and Harbor Workers' Act. By virtue of the express terms of that Statute he could not be within its terms and at the same time qualify as a seaman and member of the crew of a vessel. Although there are cases where a plaintiff has proceeded sequentially, first in the Compensation Forum, and next in the Judicial Forum, there is no case in which the plaintiff has testified to opposite effect in both of these fora in parallel. The present plaintiff not only filed his Complaint in this action alleging that he was,

> "a seaman and member of the crew of a lighter,"

(there being no such lighter), but three months after he had filed this suit he testified under oath before the Compensation Commissioner that he was a pile driver and in the presence of his counsel sought and secured the benefits of a Statute whose terms were preemptive of his purported status of a seaman. There have in all, therefore, been some

four adjudications which have preceded the present Petition. The first being adjudication before the Federal Compensation Commissioner, the second being that of the District Court, the third and fourth being that of the Court of Appeals on the formal Appeal and the Motion for Rehearing. These considerations point additionally to the unreasonableness of the present Petition, and the appropriateness of its denial.

Conclusion.

The Petition fails to cite a single decision by any Court at any level which is in any degree in conflict. The Petition does not present any basis for meeting the considerations governing the review on certiorari provided by Rule 19 of the Supreme Court. The Respondent, McKie Lighter Co., Inc., respectfully submits that the Petition should properly be denied. The Respondent, Bethlehem Steel Corporation, respectfully submits that the Petition should be denied.

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